TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 168.

THOMAS W. POTTER, APPELLANT,

vs.

MARY HALL.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

FILED SEPTEMBER 26, 1901.

(16,209.)

(18,269.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 416.

THOMAS W. POTTER, APPELLANT,

vs.

MARY HALL.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 11, 1901.

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a In the Supreme Court of the Territory of Oklahoma.

THOMAS W. POTTER, Plaintiff in Error,
vs.
MARY HALL, Defendant in Error.

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States of America, to be holden at the city of Washington, on the 24th day of September, 1901, pursuant to an appeal filed in the supreme court of Oklahoma Territory, wherein Thomas W. Potter is appellant and you are appellee, to show cause, if any there be, why the judgment, order and decree rendered and entered against said appellant, as in his petition of appeal mentioned, should not be corrected and speedy justice be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 24th day of August, in the year of our Lord one thousand nine hundred and one, and the Independence of the United States of America, the one hundred and twenty-sixth.

[Seal Supreme Court, Territory of Oklahoma.]

B. F. BURWELL,
Associate Justice of the Supreme Court of Oklahoma Territory.

Attest: BENJ. F. HEGLER,
Clerk of Supreme Court.

We hereby acknowledge that the above citation was served on us this 29th day of August, A. D. 1901.

F. E. GILLETT,
M. D. LIBBY,
Solicitors for Appellee.

Filed Sept. 11, 1901.
BENJ. F. HEGLER,
Clerk Supreme Court.

[Endorsed:] 1054, Thomas W. Potter, *vs.* Mary Hall, Citation. Filed Sep. 11 1901 Benj. F. Hegler, clerk supreme court, by ——, deputy.

1 Pursuant to the annexed citation and the order granting the appeal in the cause therein mentioned, I do hereby return into the Supreme Court of the United States, a transcript in the record mentioned in appeal and said citation as follows, to wit:

2 Be it remembered that on the 20th day of Dec'r 1900, the plaintiff in error filed his petition in error in the office of the clerk of the supreme court of Oklahoma Territory, together with the case-made thereto attached, which said petition in error and case-made, together with the endorsements thereon are in words and figures following, to wit:

3 In the Supreme Court of the Territory of Oklahoma.

THOMAS W. POTTER, Plaintiff in Error,
vs.
MARY HALL, Defendant in Error.

Petition in Error.

The said Thomas W. Potter, the plaintiff in error, complains of said defendant in error, Mary Hall, for the reason that the said Mary Hall, at the March, 1900, term of the district court of Canadian county, Territory of Oklahoma, recovered a judgment by the consideration of said court, against the said Thomas W. Potter in a certain action then pending in said court, wherein the said Thomas W. Potter was plaintiff, and the said Mary Hall was defendant. A certified transcript of the original case-made, duly certified and attested, is hereto attached, marked "Exhibit A" and made a part of this petition in error.

And the said Thomas W. Potter, plaintiff in error, avers that there was error in the said record and proceedings in this, to wit:

First. Said court erred in overruling the demurrer of the plaintiff in error to the amended answer and cross-petition of the defendant in error, to which action, the plaintiff in error at the time excepted.

Second. Said court erred in ruling, after plaintiff's demurrer to said amended answer and cross-petition had been overruled, that plaintiff should plead further to the defendant's answer and cross-petition, plaintiff in error having elected to stand upon said demurrer, and to appeal to the supreme court of the Territory of Oklahoma from said decision and judgment of said demurrer.

Third. Said court erred in rendering judgment against the plaintiff in error and in favor of the defendant in error on the pleadings.

Wherefore plaintiff in error prays that said judgment, so rendered, may be reversed, set aside and held for naught, and that a judgment may be ordered to be rendered in favor of the plaintiff in error and against the defendant in error upon the pleadings, and that the plaintiff in error be restored to all rights he has lost by the rendition of the judgment, and that he have such other and further relief as to the court may seem just.

THOMAS W. POTTER,
Plaintiff in Error,
By J. H. EVEREST,
His Attorney.

Filed Dec. 20, 1900.

BENJ. F. HEGLER,
Clerk Supreme Court.

4 EXHIBIT "A."

In the District Court of the Second Judicial District within and for Canadian County, Oklahoma Territory.

THOS. W. POTTER, Plaintiff,
v.
MARY HALL, Defendant. } Case-made.

Be it remembered, that heretofore, on January 28th, 1898, the plaintiff, Thos. W. Potter, filed in the district court of Canadian county, Oklahoma Territory, his amended petition, which is in words and figures as follows, to wit:

5 Copy.

In the District Court of the Second Judicial District within and for Canadian County, Oklahoma Territory.

THOMAS W. POTTER, Pl'ff,
vs.
MARY HALL, Def't. } Ejectment.

Amended Petition.

The plaintiff complains of the defendant and alleges as a cause of action herein that the plaintiff is seized in fee-simple and is the legal and equitable owner of the following-described real estate, situate and lying in Canadian county, Oklahoma Territory, to wit: Lots three (3) and four (4) and the south half of the northwest quarter of section numbered four (4) in township numbered twelve (12) north of range numbered seven (7) west, containing about 142.50 acres, and is entitled to the immediate possession of the same; that the plaintiff's title is derived from the United States of America, under section # 2291 of the Revised Statutes of the United States; and plaintiff attaches hereto a true and correct copy of the final receipt or certificate issued to him for said land, and marks the same Exhibit "A" and makes it a part of this petition; that the defendant is occupying a small portion of said land above described, to wit: about two acres in the southwest corner thereof, and that the defendant unlawfully keeps him, the said plaintiff, out of the possession of the same.

Wherefore plaintiff prays for restitution of said premises, and for his costs herein expended.

J. H. EVEREST,
Attorney for Plaintiff.

6 (*Copy of Exhibit "A," Attached to said Amended Petition.*)

(4–140.)

EXHIBIT "A."

Final receiver's receipt No. 2861, application No. 10723.

Homestead.

RECEIVER'S OFFICE,
OKLAHOMA, O. T., *Dec. 8th*, 1897.

Received of Thomas W. Potter, the sum of three dollars 56 cents, being the balance of payment required by law for the entry of lots 3 and 4 and S. ½ N. W. ¼ of section 4 in township 12 N. of range 7 W. containing 142.50 acres, under section 2291 of the Revised Statutes of the United States.

(Copy)

ANTON H. CLASSEN, *Receiver.*

$3.56.

$.75 testimony fee received. Number of written words 500. Rate per 100 words 15 cents.

Said amended petition endorsed on the back as follows: No. 1589. In the district court 2nd judicial district within and for Canadian county, Oklahoma Territory. Thos. W. Potter, pl'ff *vs.* Mary Hall def't. Ejectment. Amended petition. Filed Jan. 28, 1898. J. H. Warren, clerk. J. H. Everest, for pl'ff.

7 That thereafter, to wit, on the first day of March, 1900, the defendant, Mary Hall, filed her answer and cross-petition in said cause in said court, which said answer and cross-petition, is in words and figures as follows, to wit:

8 Copy.

TERRITORY OF OKLAHOMA, } *ss:*
County of Canadian, }

In the District Court of the Second Judicial District within and for Canadian County, Oklahoma Territory.

THOMAS W. POTTER, Plaintiff, }
vs. } Answer and Cross-petition.
MARY HALL, Defendant. }

The said defendant comes now and by way of answer and cross-petition to the amended petition of the plaintiff, Thomas W. Potter, filed herein, says: That she is the widow of Gilman C. Hall, who, during his lifetime, was a homestead settler upon and pursuant to said settlement made homestead entry number 5077 for the northwest quarter of section four (4), township twelve (12), north of range

seven (7) west, in Canadian county, Oklahoma, and who was, at the time of said settlement, a native-born citizen of the United States, the head of a family, and over twenty-one years of age, and was not, at the time he made such settlement and entry, nor thereafter, seized in fee-simple of a hundred and sixty acres of land in any State or Territory, and did not abandon residence upon land of his own to enter the land in question, and did not enter upon any of the lands by the proclamation of the President opened to settlement on the 22nd day of April, 1889, subsequent to the last day of February, 1889, and prior to noon of April 22nd, 1889, and all times thereafter, to the date of his death, was qualified in all respects under the law to make homestead entry of any portion of the public domain subject to such entry, and was so qualified to make entry upon the above-described tract of land and to receive final patent therefor, and from the time of his settlement upon the tract of land to the date of his death this defendant, as his wife, was a settler with him upon said tract of land, and has continued to occupy the same as a homestead to this date, with lasting and valuable improvements
9 thereon; that during the lifetime of said Gilman C. Hall, and while he was a homestead settler and holding said tract of land under his homestead entry above stated, the plaintiff, Thomas W. Potter, filed in the U. S. land office, at Oklahoma city, a contest against the rights of Gilman C. Hall, to said tract of land, alleging that he, Potter, had a prior and better right thereto by reason of his settlement thereon, which he declared to be prior to the rights of Gilman C. Hall thereto, which said contest was regularly heard by the register and receiver of said land office, at which hearing the rights of Thomas W. Potter to said tract of land under his allegation of prior settlement was also contested upon the grounds that he was disqualified to enter said tract of land, because of the fact, first, that said land was a part of the public domain ceded to the United States by the Muscogee or Creek nation, which cession of land was ratified by act of Congress approved March 1st 1899, and was opened to settlement by proclamation of the President, March the 3rd, 1899, and Second. That said Thomas W. Potter had after the first day of March 1889, and prior to noon of April 22nd, 1889, entered upon said land so open to settlement.

That upon such hearing before said land office the hon. register and receiver found the fact to be that the said plaintiff had entered said land between said dates and was therefore under the statutes disqualified to make settlement or homestead entry thereon, a copy of which said decision of the hon. register and receiver is attached hereto, marked Exhibit "A" and made a part hereof, and afterwards, on the 19th day of February, 1894, said contest having been appealed from the decision of the said honorable register and receiver, to the honorable Secretary of the Interior, who, having the same under consideration, affirmed the decision of the register and receiver in holding the said plaintiff disqualified as above stated, and awarded said land to the entryman, Gilman C. Hall.

That afterwards there was filed by the plaintiff in the office of the Secretary of the Interior, a motion for a review of the said decision

of the Hon. Secretary, which motion being granted, a review of said decision was had by the Hon. Acting Secretary of the Interior, John M. Reynolds, who, upon consideration of the same facts found by the register and receiver, reversed the decision of the Secretary
10 and awarded said land to the plaintiff, a copy of which decision of the honorable Secretary of the Interior and acting Secretary of the Interior are attached hereto, marked Exhibit- B and C and made a part hereof.

That the facts upon which said decision is based are stated in each of said opinions filed herewith and are identical that upon the rendition of the opinion of the Hon. Acting Secretary attached hereto and marked *hereto and marked* Exhibit C said contest between the plaintiff and Gilman C. Hall was closed, and by force of said opinion said land was awarded to the plaintiff and such title as he now has thereto is by reason and force of said opinion, Exhibit C and patent issued conveying said land to him by the United States pursuant thereto.

Defendant herein further says, that the legal title to said tract of land now resting in the plaintiff pursuant to said decision and patent issued to him from the Government, for said land is held in trust for her use and benefit as the widow of Gilman C. Hall, she being the owner of and having the full equities therein by virtue of her said husband's residence and entry of said land, and full compliance with the homestead laws of the United States Government, for the disposition of the public domain, for she says: There was error of law in the conclusion of the Hon. Acting Secretary in his decision, Exhibit C above referred to, in which as hereinbefore stated the opinion of the local office and of the Secretary was reversed, and the rights of Gilman C. Hall, cancelled, in this that on the facts proven and stated in the opinion, "A" "B" and "C" attached hereto, under the law said decision should have been in favor of Gilman C. Hall, affirming the opinion of the Hon. Secretary and that by reason of such error of law, on the part of the Hon. Acting Secretary, the defendant was deprived of her entry and patent to said land and the same was awarded to the plaintiff, contrary to law, the plaintiff herein acquired no equitable right, but that the equities were with the entryman, Gilman C. Hall, and are now with this defendant, that as the widow of Gilman C. Hall, she has the better and superior title to said tract of land, and to the legal title of the plaintiff so acquired.

11 Wherefore, the defendant prays judgment of the court adjudging and decreeing the title of the plaintiff in the land herein described to be held by him in trust for the use and benefit of defendant, and for a decree requiring and directing the plaintiff to execute to her and for her use and benefit a deed of conveyance of said tract of land, and upon his failure to comply with such order that the decree of the court herein be by order of the court made to operate as a conveyance of the same from plaintiff to defendant, and for costs of this action.

F. E. GILLETT,
M. D. LIBBY,
Att'ys for Def't.

TERRITORY OF OKLAHOMA, } ss:
County of Canadian, }

Mary Hall, being first duly sworn, upon her oath says: That she is the defendant in the above-entitled case; that she has read and knows the contents of the above answer, on her behalf, and that the allegations thereof are true.

MARY HALL.

Subscribed and sworn to before me this 1 day of M'ch, 1900.
[SEAL.] CHAS. A. NEWMAN,
Notary Public.

My commission expires Nov. 11, 1900.

1589.

12 Copy.

UNITED STATES LAND OFFICE,
OKLAHOMA CITY, O. T., *Nov.* 7, 1891.

THOMAS W. POTTER } Involving H. E. # 5077 for N. W. ¼ Sec. 4,
vs. Twp. 12 N., R. 7 W.
GILMAN C. HALL. }

"Ex. 'A.'"

This tract of land was originally involved in the town-site applications of town of Harrison, which matter was finally disposed of by the Hon. Commissioner's letter "G" of March 11, 1891, leaving this tract of land to be disposed of between the agricultural claimants.

Gilman C. Hall made H. E. # 5077 for said tract on Jan. 13th, 1890.

Thomas W. Potter filed affidavit of contest against the town-site application on May 8th, 1889, alleging prior settlement.

On March 4th, 1890, Potter filed affidavit of contest against the entry of Hall in which he alleges prior settlement on April 22, 1889, that he made application to enter said land (tract) on May 7th, 1889, which was rejected for conflict with the previous town-site application, from which action he appealed, that said Hall was a soldier in the regular army and could not establish a legal residence on said tract and that said Hall has abandoned said tract. A number of other allegations are embraced in said contest which are not material and state no cause of action.

The cause was set for hearing and both parties appeared, waived notice, and submitted their testimony. As we understand this case the issues involved are: First: The prior settlement of Potter and incident thereto his qualifications as a homesteader. Second: The qualifications of Hall as a homestead entryman. Third: The abandonment of Hall or failure to establish residence as required by law.

Under the evidence submitted by both parties we find that Pot-

ter made settlement upon said tract on the 22nd day of April, 1889, and that he has established residence and maintained the same as required by the homestead laws.

13 That Hall established residence upon said tract with his family in October, 1889, and has maintained said residence to the time of trial, though he has been absent most of the time on military duty.

As to the questions of Potter's qualifications, it is shown that for some time previous to the opening of Oklahoma to settlement he has been in the employ of the Indian agent in charge of the Cheyenne and Arapahoe agency, which reservation adjoins the Oklahoma lands on the west. On the morning of April 22, 1889, he was directed by the Indian agent to take charge of 15 Indian policemen and proceed to the east line of the Cheyenne and Arapahoe reservations and preserve order and prevent any settlement on the same. In pursuance of this order, Potter, went to the vicinity of this land on the forenoon of April 22nd, 1889, and during said forenoon went across the line and onto the said tract and ordered persons off the same. Immediately after twelve o'clock he made settlement upon said tract. The authority of Potter obtained from the Indian agent, was only coextensive with the Cheyenne and Arapahoe Indian reservation and did not extend to the Oklahoma lands. His orders were to prevent settlement being made on the reservation and not that he should prevent settlement upon the Oklahoma lands. When he crossed the land onto this tract before the legal hour, he became a trespasser, the same as any other person not clothed with authority. The fact that he exhibited anxiety to keep this tract clear and exceeded his authority so far as to leave the reservation and order people off of this tract would raise a very strong *influence* (inference) that he had this particular tract in view and intended to settle upon it.

The evidence fails to show that any very valuable or permanent improvements have been made upon this tract by either claimant. In view of all the facts we think the equities are with the entryman, Hall, and that Potter is disqualified from making homestead entry for the said tract.

We therefore recommend that the contest of Potter be dismissed, his application to enter rejected and that the homestead entry of Hall remain intact. 30 days are allowed for appeal.

JNO. H. BURFORD, *Register.*
J. C. DELANEY, *Rec.*

14 Copy.

Ex. B. R. B.

THOMAS W. POTTER
vs.
GILMAN C. HALL.

FEBRUARY 19, 1894.

The Commissioner of the General Land Office.

SIR: This record presents the appeal of Mary Hall, widow of Gilman C. Hall, deceased, from your office, decision dated July 7th, 1892, in the case of Thomas W. Potter *vs.* said Gilman C. Hall, involving the S. ½, N. W. ¼ and lots 3 and 4 sec. 4, twp. 12, N. R., 7 W. Oklahoma city, Oklahoma.

Also the controversy arose upon contest alleging prior settlement and also that Hall being in the military service of the United States was not a qualified homesteader, and that he, Hall, had abandoned the land, initiated, March 4th, 1890, against Hall's homestead entry made for the same, Jan. 13, 1890.

By its said decision your office reversed that of the register — receiver sustained Potter's contest and held the entry of Hall for cancellation. The pending appeal is from this judgment.

This history of the case and the material facts are set out in the decision appealed from and need not be restated in detail. The tract in question formed a part of the lands in Oklahoma which were opened to settlement at noon on April 22nd, 1889; shortly before this date, Potter had been appointed by the Indian agent of the Cheyenne and Arapahoe agency as assistant chief of police, with instructions to proceed to the east line of the reservation, preserve order and prevent any settlement on the same. The east line of the Cheyenne and Arapahoe reservation is also the west line of the lands opened for settlement as aforesaid and is within possibly a quarter of a mile from the tract in question. On this morning of April 22, 1889, some three or four hours before the hour of noon, Potter whom it seems was at said line, seeing some freighters camped on the land involved went thereon to order them off, he then returned to the line and *the* the hour of noon started in the race for a claim, he
15 reached the land before any of his competitors, and as he states commenced his settlement at one-half or one minute after 12 o'clock.

In my opinion the facts just stated sustain the conclusion *the conclusion* reached by the local officers to the effect that Potter was not qualified to enter the tract in question, by going into the Territory on the morning of April 22nd, 1889, before the hour when the lands therein were opened to settlement, he necessarily secured an opportunity to observe the various tracts lying near the line and the ways of reaching them, and this taken in connection with the fact that at the said hour he went directly from the line to the land in question makes it plain in my mind that if he did not previously select the tract of land in dispute, he obtained information that gave him an

advantage over rival claim-seekers. It follows under the prevailing rulings (Dean *vs.* Simmons, 17 L. D. 526), and cases cited, that Potter is not qualified to make entry of land in Oklahoma, and that his application to enter the tract in question must be rejected.

The fact that the entryman, Hall, was in the army is not of itself sufficient to invalidate his entry, (Shannon *vs.* Hoffman, 4 L. D. 399) nor does the evidence, (Potter's claim being eliminated from the case) warrant its cancellation on the ground of abandonment.

The entry of Hall will accordingly remain intact. The foregoing de-position of the case renders it (unnecessary?) for me to discuss the other questions presented by the record. The decision appealed from is reversed. Herewith I return the papers.

Very respectfully, HOKE SMITH, *Secretary.*

16 Copy.

TERRITORY OF OKLAHOMA, } ss:
County of Canadian, }

I, C. A. Van Ness, a notary public, within and for the county and Territory above mentioned, do hereby certify, that the copies hereto attached are true and correct copies of the decisions of the Secretary of the Interior, of the brief of Gilman C. Hall, of the reply of Gilman C. Hall, of the answer to motion for review, and of the review of acting Secretary of the Interior; in the contest case of Thomas W. Potter, *vs.* Gilman C. Hall, as compared with the instruments now before me.

In testimony whereof, I have hereunto set my hand and affixed my notarial seal this 4th day of April A. D. 1896.

C. A. VAN NESS,
Notary Public.

My commission expires October 10, 1897.

17 EXHIBIT "C."

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *December* 5, 1895.

THOMAS W. POTTER
vs.
GILMAN C. HALL. } On Review.

Commissioner of the General Land Office.

SIR: On January 13, 1890, Gilman C. Hall made homestead entry on S. ½ of the N. W. ¼ and lots 3 and 4, sec. 4, twp. 12, N. R. 7 W. of the land district of Oklahoma city, Oklahoma.

On March 4, 1890, Thomas W. Potter filed an affidavit of contest, alleging prior settlement and that Hall had abandoned the land, and he was disqualified by reason of his being in the military service of the United States.

The case having reached this department through the course of procedure it was here held February 19, 1894, L. & R. N. O. 281, p.

201, that Potter having entered the Territory of Oklahoma before 12 o'clock noon April 22nd, 1889, was disqualified to make homestead entry therein and, that the evidence did not warrant the cancellation of Hall's entry on the ground of abandonment. Potter had filed a motion for review, the various grounds of which are for the purpose of argument condensed by his counsel into the two following:

"1. In holding as a fact that Potter by entering the Territory prior to noon, necessarily or in any way, secured an opportunity to observe the various tracts of land lying near the line, or thereby secure any advantage over other claim-seekers and particularly over Gilman C. Hall."

2. In holding that by reason of entering said Territory in the line of duty, Potter was disqualified under the law from entering any land, "in the Territory."

The decision on review sets out a statement of the facts on which its conclusions are based as follows:

18 The tract in question formed a part of the lands in Oklahoma which were opened to settlement at noon on April 22nd, 1889. Shortly before this date Potter had been appointed by the Indian agent at the Cheyenne and Arapahoe agency as assistant chief of police, with instructions to proceed to the east line of the reservation to preserve order and prevent any settlement on the same. The said east line of the Cheyenne and Arapahoe reservations is also the west line of the lands opened to settlement, as aforesaid, and is within possibly a quarter of a mile from the tract in question.

On the morning of April 22nd, 1889, some three or four hours before the hour of noon, Potter, whom it seems was at said line, seeing some "freighters" camping on the tract involved, went thereon and ordered them off, he then returned to the line and at the hour of noon started in the race for the claim. He reached the land before any of his competitors and as he states commenced his settlement at one-half or one minute after twelve o'clock.

Accepting this statement as correct and a re-examination of the record satisfies me of its correctness so far as it goes, I scarcely think the conclusion warranted that he necessarily secured an opportunity to observe the various tracts of land lying near the land and the way of reaching them, so that he obtained information that gave him an advantage over rival claim-seekers. He had been employed at the Cheyenne and Arapahoe agency near by since 1883, and for six years before the opening of the country to settlement, he had lived in close proximity to the land in dispute. He had nothing to gain or to learn. Therefore, by the short excursion with which he is charged and which it cannot be denied was made in the performance of duty devolved upon him by the orders of the agent who appointed *to* him to the command of the police at that point. He neither gained or sought advantage and it was error to hold that under the circumstances of entry into the Territory, he was disqualified thereby.

19 Proceeding now to consider the case on its merits, the evidence seems conclusive*ly* that Potter was the prior settler

that he established residence upon the land on April 22, 1889, the day of the opening, and maintained it for several months, may be considered as proven.

The efforts of the defendant, Hall, were mainly directed on this branch of the case, to showing abandonment by Potter, but I do not think the testimony sustains his contentions, the latter was called away from home on business during the fall of 1889, and the winter following, but those absences were not of a character to indicate a purpose to abandon his homestead. During that period he made two trips to Carlisle, Pa., in charge of children destined for the Indian school located at that place and spent the winter there in doing work in some capacity, returning in the spring. He is a young man without any family and was accumulating means and swears that his absences from the land *was* rendered necessary by his financial condition.

Both Potter and Hall have improvements. in neither case very expensive or valuable, but sufficient for both to show good faith, but the former's possession is the stronger by virtue of the priority of his settlement. That fact, however, is sufficient to determine the controversy in his favor.

The decision heretofore rendered is therefore revoked, and set aside and your office decision holding Hall's entry for cancellation is affirmed. The papers in the case are herewith returned.

Very respectfully, JOHN M. REYNOLDS,
Acting Secretary.

Endorsed on the back as follows: No. 1589. Thos. W. Potter, *vs.* Mary Hall. Answer and cross-petition. Filed 3, 1, 1900. W. S. Hunter, clerk. Gillett and Libby, att'ys.

20 And thereafter to wit: on June 23rd, 1900, the plaintiff filed in said court his motion to strike certain exhibits from the amended answer and cross-petition of the defendant, filed in said case, which said motion is in words and figures as follows, to wit:

21 Copy.

Motion.

In the District Court, Second Judicial District, within and for Canadian County, Territory of Oklahoma.

THOMAS W. POTTER, Pl'ff,
vs.
MARY HALL, Def't.

Comes now the plaintiff, and moves to strike from the files, and from said amended answer and cross-petition the Exhibits A, B, and C attached to said petition, being the copies of the decisions of the register and receiver of the U. S. land office at Oklahoma city, O. T., of the Commissioner of the General Land Office, Washington, D. C., and of the first decision of the honorable Secretary of the Interior,

which was afterwards vacated, in review, as being irrelevant, immaterial and surplusage.

THOS. W. POTTER, *Plaintiff,*
By J. H. EVEREST, *His Att'y.*

Endorsed as follows: 1589. Potter *vs.* Hall. Motion to strike certain exhibits from amended answer and cross-petition. Filed in open court June 23rd, 1900. E. M. Hegler, clerk.

22 That thereafter, and on to wit the same day, the 23rd day of June, 1900, the said cause coming on for hearing upon the motion of the plaintiff to strike from the amended answer and cross-petition of the defendant certain exhibits attached thereto, marked "A" "B" and "C" after hearing argument of counsel and being fully advised in the premises, the court overrules said motion, to which ruling of the court the plaintiff at the time duly excepted.

23 That on to wit, the 2nd day of March A. D. 1900, the plaintiff filed in said court his demurrer to the answer of the defendant, which said demurrer is in words and figures as follows, to wit:

24 Copy.

In the District Court of the Second Judicial District within and for Canadian County, Territory of Oklahoma.

THOMAS W. POTTER, Plaintiff,
vs.
MARY HALL, Def't. } Ejectment.

Demurrer to Answer.

Comes now the above-named plaintiff, Thomas W. Potter, and demurs to the amended answer of the defendant, Mary Hall, for the reason that said answer does not state facts sufficient to either constitute any defense to the action of the plaintiff or to state any cause of action against plaintiff.

THOMAS W. POTTER, *Plaintiff,*
By J. H. EVEREST, *His Attorney.*

Endorsed as follows: Case No. 1589. In the district court, Canadian county, Territory of Oklahoma. Thomas W. Potter, pl'ff, *vs.* Mary Hall, def't. Demurrer to answer. Filed 3, 2, 1900. W. S. Hunter, clerk. J. H. Everest for pl'ff.

25 That thereafter, and on to wit: the 23rd day of June, 1900, the said cause coming on to be heard upon the demurrer of the plaintiff to the amended answer and cross-petition of the defendant, and after hearing arguments of counsel and being fully advised in the premises, said demurrer is by the court overruled, to which ruling of the court the plaintiff at the time duly excepted. That plaintiff elects to stand on said demurrer and refuses to plead further in said cause.

26 That thereafter, on the same day, to wit the 23rd day of June, A. D. 1900, the court renders judgment in said cause, which is in words and figures as follows, to wit:

27 In the District Court of Canadian County, Oklahoma Territory.

THOMAS W. POTTER, Plaintiff,
vs.
MARY HALL, Defendant.
} Case No. 1589. Journal Entry.

Now, on this 23rd day of June, 1900, the same being a day of the regularly adjourned March term of the said court, the above-entitled cause is regularly called for trial, plaintiff Thomas W. Potter, present by his attorney J. H. Everest, and the defendant Mary Hall, present by her attorneys, F. E. Gillett and M. D. Libby. The defendant asks leave of court to amend her answer and cross-petition herein to make it more definite and certain in the matter of stating the qualifications of Gilman C. Hall (mentioned in said answer and cross-petition), to enter the lands in said answer and cross-petition described under the homestead laws of the United States, and leave is granted to so amend forthwith by interlineation which is done.

Leave is thereupon granted to the plaintiff to file motion to strike out of the defendant's answer and cross-petition certain exhibits thereto attached and in said motion described, and said motion is filed, considered by the court and overruled, to which ruling of the court overruling the said motion the plaintiff excepts.

And thereupon the demurrer heretofore filed by the plaintiff to the defendant's answer and cross-petition is by the plaintiff renewed to the said answer and cross-petition as amended, and the court having fully considered the said demurrer overruled the same to which ruling of the court overruling the said demurrer the plaintiff excepts.

It is then ruled by the court that the plaintiff plead further to the defendant's answer and cross-petition as amended, to which ruling and order of the court to plead further the plaintiffs except-, and refuses to plead further or reply to the defendant's answer and cross-petition as amended, and elects to stand upon his said demurrer thereto, and asks for and is granted sixty days' time from this day in which to make and serve a case-made for the supreme
28 court, and ten days are granted to the defendant in which to suggest amendments to such case-made, the case-made to be settled and signed on five days' notice.

The court thereupon finds that the plaintiff admits the facts stated and alleged in the defendant's answer and cross-petition to be true, and that the same are true, and finds the issues in a favor of the defendant.

It is therefore considered, ordered, and adjudged by the court that the plaintiff, Thomas W. Potter, holds the legal title in and to the land described in his petition and in the answer and cross-petition of the defendant, Mary Hall, in trust for her use, and that

the defendant, Mary Hall, holds the paramount equitable title, right, and interest in and to said land.

And it — further considered, ordered, and adjudged by the court that the said Thomas W. Potter convey to the said Mary Hall, by deed in fee-simple, duly acknowledged, all his right, title, and interest in and to the said lands, more particularly described as follows, to wit: Lots three (3) and four (4) and the south one-half of the northwest quarter of section four (4), in township twelve (12), north of range seven (7), west of the Indian meridian, in Canadian county, Oklahoma Territory, the same constituting the northwest quarter of said section, which deed he is required to deliver to the clerk of this court on or before the 18th day of August, 1900, for the said defendant's use; and if the said Thomas W. Potter shall fail to deliver such deed to the said clerk by the time required herein, then this judgment shall have the same operation and effect and be as available to the said Mary Hall as if the said deed had been executed and delivered comformably thereto.

And it is further considered, ordered, and adjudged by the court that the defendant, Mary Hall, have and recover of and from the plaintiff, Thomas W. Potter, her costs of suit herein expended in the sum of $1.05. To which judgment of the court the plaintiff excepts.

— —.

O. K. J. H. E.,
Att'y for Pl'ff.

Endorsed as follows: No. 1589. Thomas W. Potter *vs.* Mary Hall. Journal entry. Filed 6, 26, 1900. E. M. Hegler, clerk. Filed Dec. 20, 1900. Benj. F. Hegler, clerk supreme court.

29 In the District Court in and for Canadian County, Oklahoma.

THOMAS W. POTTER, Plaintiff,
vs.
MARY HALL, Defendant. } Certificate.

I hereby certify that the above and foregoing case-made contains a true and correct statement of all the pleadings, motions, demurrers, orders, findings, and proceedings of every kind and nature had in said cause.

J. H. EVEREST,
Attorney for Plaintiff.

30 In the District Court within and for Canadian County, Oklahoma.

THOMAS W. POTTER, Plaintiff,
vs.
MARY HALL, Defendant. } Acceptance of Service.

We, the undersigned, attorneys for the defendant in the above-styled cause, accept service this 5th day of July A. D. 1900, of the

above and foregoing case-made, and consent that said case be settled and signed by the judge of said court without further notice.

F. E. GILLETT,
M. D. LIBBY,
Att'ys for Defendant.

Filed Dec. 20, 1900.

BENJ. F. HEGLER,
Clerk Supreme Court.

31 In the District Court in and for Canadian County, Oklahoma Territory.

THOMAS W. POTTER, Plaintiff,
vs.
MARY HALL, Defendant.
} Certificate.

This is to certify that the foregoing above case-made has been duly served in due time, and the same duly submitted to me for settlement and signing as required by law, by the parties to said cause, that the same as above set forth and as corrected by me, is true, full and correct, and contains a true and correct statement of all the pleadings, motions, orders, findings, proceedings and judgments had in said cause; and I hereby settle, allow, certify and sign the same as true and correct. And hereby order that the clerk of the district court attest the same with the name and seal of said court, and file the same of record as provided by law.

Witness my hand at El Reno, in Canadian county, Oklahoma Territory this 5th day of July, 1900.

C. F. IRWIN,
Judge District Court.

Attest:
[SEAL.] E. M. HEGLER,
Clerk of the District Court of Second Judicial District of the Territory of Oklahoma.

Filed this 5 day of July, 1900.

E. M. HEGLER,
Clerk District Court.

Filed Dec. 20, 1900.

BENJ. F. HEGLER,
Clerk Supreme Court.

Service of summons upon defendant in the above-entitled cause in the supreme court is hereby waived.

M. D. LIBBY,
Attorney for Defendant.

Filed Dec. 20, 1900.

BENJ. F. HEGLER,
Clerk Supreme Court.

32 And at the June term, 1901, of said supreme court, on the third day of June, 1901, the following order was made in said cause, to wit:

33 THOMAS W. POTTER, Plaintiff in Error,
vs.
MARY HALL, Defendant in Error. } #1054.

Ordered by the court that this cause be now submitted on briefs and record.

34 And afterward, to wit: at the June term, 1901, of said supreme court, on the sixth day of July, 1901, the following journal entry of opinion in said cause was made in words and figures as follows, to wit:

35 THOMAS W. POTTER, Plaintiff in Error,
vs.
MARY HALL, Defendant in Error. } #1054.

Now this cause comes on for final decision by the court upon the record and briefs submitted therein.

And the court having duly considered the same, and being fully advised in the premises, finds; that the judgment of the lower court in this cause should be affirmed, at the cost of plaintiff in error.

It is therefore ordered and adjudged by the court: That the judgment of the trial court in this cause be and the same is hereby affirmed, at the cost of plaintiff in error.

Opinion by McAtee, J., all the justices concurring, except Irwin, J., who presided in the trial of the cause below, not sitting.

36 And at said June term, 1901, on said sixth day of July, 1901, said supreme court rendered a final opinion in said cause, which opinion reads in words and figures as follows, to wit:

37 In the Supreme Court of the Territory of Oklahoma, June Term, 1901.

Filed July 6, 1901.

THOMAS W. POTTER, Plaintiff in Error,
vs.
MARY HALL, Defendant in Error. } No. 1054.

Syllabus.

1. This is a contest for the ownership of a homestead. The plaintiff was under the employment of the Indian agent upon the Cheyenne reservation, at the time referred to. He was directed by the Indian agent, on the morning of the opening to "proceed to the east line of the Cheyenne and Arapahoe, reservation, to preserve order and prevent any settlement on the same."

At twelve o'clock on that day, the lands were opened to settlement, and within a minute or a minute and a half thereafter the plaintiff was upon the land in dispute, asserting his claim to it as a homestead. During that morning he crossed the east line of the Indian reservation and entered upon the lands about to be opened for settlement, and upon the tract of land here in question, for the purpose of removing some persons who were camping there. This entry was a violation of the acts of Congress of March 1st and 2nd, 1889, which provide, with reference to the opening of these lands for settlement, that: "Any person who may enter upon any part of the lands prior to the time that the same are opened to settlement by the act of Congress shall not be permitted to occupy or make entry of such lands or any part thereof," and that "until such lands are opened to settlement by proclamation of the President, no person shall be permitted to enter upon and occupy the same, and no person violating this provision shall ever be permitted to enter any of said lands or acquire any right thereto."

The act of the plaintiff in entering upon the quarter section of land in controversy is a violation of these acts of Congress, and disqualifies him from acquiring title to the land in dispute.

2. The husband of the defendant made the homestead entry upon the land and was, at the time, a citizen of the United States. He subsequently died, leaving the defendant his widow. Under the Revised Statutes of the United States, section 1994, second section of the act of Congress of February 10th, 1855, declaring that "any woman who might lawfully be naturalized under the homestead laws, married, or who shall be married to a citizen of the United States, shall be deemed and taken to be a citizen." The defendant is entitled to the privileges of citizenship, and to the acquisition of land under the homestead laws of the United States.

3. At the trial below, upon the overruling of the demurrer of the plaintiff to the answer and cross-petition of the defendant, the plaintiff elected to stand upon his demurrer, and the trial court thereupon rendered final judgment in the case.

Held: That this is the correct proceeding. When a demurrer is overruled, and the defendant elects to stand upon and abide by his demurrer, the submission of the case is a final submission and the judgment thereupon is final.

4. It is objected to the rendition of the judgment in behalf of the defendant, that it was made to appear by a copy of the final receipt from the land office, which the plaintiff had attached to his amended petition, that he had paid out the sum of $3.50, that balance of payment required by law for the entry of the land as a homestead, and he now contends that he should have judgment here because the answer and cross-petition failed to aver a tender into court of this amount. We cannot sustain this contention. The court is constituted for the

purpose of administering justice in matters of grave interest to the parties, and not upon points of trivial moment, tending to promote contentious litigation. The maxim applies that "*de minimis non curat lex.*"

Error from the district court of Canadian county. C. F. Irwin, trial judge. Affirmed.

J. H. Everest, for the plaintiff in error.
F. E. Gillett and M. D. Libby, for the defendant in error.

Statement of Facts.

This was an action, under chap. 66, art. 24 of the Statutes of 1893, for the recovery of real property, lots 3 and 4 and south half of N. W. quarter of sec. 4, twp. 12, N. of R. 7 west 1. M., in Canadian county, under the homestead laws of the United States.

The action was tried upon an amended answer and cross-petition. The defendant alleged that she was the widow of Gilman C. Hall, a native-born citizen of the United States, in all respects a
38 qualified entryman, and entitled to receive final patent therefor, from the time of his settlement to the date of his death some time after he made homestead entry therefor, and that the defendant, as his wife, was a settler with him upon the tract of land and had continued to occupy the same during the lifetime and after the death of the said Hall, and that while the said Hall was a homestead settler, holding the tract of land thereunder, Potter filed a contest against him, alleging priority of his right, and that hearings were had, findings of fact made and decisions rendered by the register of the local land office, by the Commissioner of the General Land Office, by the Secretary of the Interior, and afterward and finally upon review, by the acting Secretary of the Interior, in the absence of the Secretary; that in all these hearings, the findings of fact and the respective judgments of these officers had been uniformly in favor of the right asserted by the homestead entry of the defendant, except that finally and upon the motion for review before the acting Secretary of the Interior, he, upon a consideration of the same facts found by the register and receiver of the local land office, by the Commissioner of the General Land Office and of the Secretary of the Interior, reversed the decision of the Secretary and awarded the land to the plaintiff, Potter. Copies of the findings of fact of the register and receiver are annexed to the answer and cross-petition of the defendant thereto with proper averments, the defendant declaring that findings of fact and conclusions of law made by the register and receiver, the Commissioner of the General Land Office and the Secretary of the Interior, were correct, and that the order made by the acting Secretary of the Interior subsequently, by which she was deprived of her entry and patent to the land, which was by the acting Secretary awarded to the plaintiff, Potter, was contrary to law, and that the equities had been with the entryman, Gilman C. Hall, and were now with his widow, the defendant.

The prayer was for a decree declaring a trust in the plaintiff for the benefit of the defendant, Hall, and directing the execution of a deed accordingly.

The plaintiff demurred to this amended answer and the affirmative averments of the cross-petition. The demurrer was overruled by the court below, and the plaintiff elected to stand upon his demurrer and final judgment was entered in the case in favor of the defendant. The case is brought here by the plaintiff, Potter, who seeks a reversal of this judgment.

Opinion of the court by McATEE, *J.*:

The findings of fact material to a determination of the case were practically identical as made by the register and receiver of the local land office, by the Secretary of the Interior and by the acting Secretary of the Interior, upon review of the case.

They were that Potter had made settlement upon the tract of land upon the 22nd day of April, 1889, and had established residence and maintained the same as required by the homestead laws. That Hall who had the homestead entry established residence upon the land with his family in October, 1889, and has maintained that residence up to the time of the trial in the land office. It was found that for some years previous to the opening of Oklahoma to settlement, he had been in the employment of the agent in charge of the Cheyenne and Arapahoe Indian agency, which adjoins the Oklahoma lands on the west. On the morning of April 22nd, 1889, he was directed by the agent to take charge of a squad of Indian policemen and proceed to the east line of the reservation for the purpose of preserving order and preventing any settlement thereupon. In pursuance of this order, he went to the vicinity of the land in question on the forenoon of April 22nd, 1899, and during the morning went across the line, and upon the tract of land in question and ordered off some persons who were camping thereupon. At 12 o'clock, the hour at which the lands were opened for settlement, he again left the land and line of the Indian reservation and immediately thereafter, within a minute or a minute and a half, made settlement upon the land in question.

The act of Congress which provided for the opening of these lands, enacted March 1st, 1889, and found in section 2 chapter 317, Statutes at Large, provides that:—

39 "Any person who may enter upon any part of said lands in said agreement mentioned, prior to the time that the same are opened to settlement by act of Congress, shall not be permitted to occupy or make entry of such lands or any part thereof."

And the act of Congress of the next day, March 2nd, 1889, 25 Statutes at Large, chapter 412, provide, with reference to the same lands, that:—

"Until such lands are opened to settlement by proclamation of the President, no person shall be permitted to enter upon and occupy the same, and no person violating this provision shall ever be permitted to enter any of said lands or acquire any right thereto."

It is upon these undisputed statements of fact and upon this condi-

tion of the law, that the acting Secretary of the Interior came to the conclusion that since he, Potter, "had been employed at the Cheyenne and Arapahoe agency near by for six years before the opening of the country to settlement, he had lived in close proximity to the land in dispute, he had nothing to gain or to learn, therefore, by the short excursion with which he is charged, and which it cannot be denied was made in the performance of duty devolved upon him by the orders of the agent who appointed him to the command of the police at that point. He neither gained or sought advantage, and it was error to hold that under the circumstances of entry into the Territory, he was disqualified thereby."

The explicit terms of the Federal statute, with its clear and peremptory prohibition, do not leave this question open to be determined by inferences. Potter was appointed on the Indian force on the morning of the opening of the land for settlement, April 22, 1889, and was directed by the Indian agent to "proceed to the east line of the Cheyenne and Arapahoe reservation to preserve order and prevent any settlement on the same." When he crossed the east line of the Indian reservation and entered upon the lands which were about to be opened for settlement upon the same day, and entered upon the tract of land which he afterward and on the same day undertook to occupy as a homestead, it was not in pursuance of the duty thus deputed to him by the Indian agent. He was acting in excess of it. The Indian agent had no authority to authorize him to cross the line of the Indian reservation, and did not authorize him to do so. When he crossed that line and entered upon the land in dispute here, he placed himself expressly under the prohibition of the statute against "entering upon any part of said lands," and under the penalty which provides that such person "shall not be permitted to occupy or make entry of such lands or any part thereof" "or acquire any right thereto."

And this violation of the Federal statute cannot be reasoned away by the suggestion made by the acting Secretary of the Interior, that "he had been employed at the Cheyenne and Arapahoe agency for six years before the opening of the country to settlement, had lived in close proximity to the land in dispute, and had nothing to gain or to learn," and that when he made "the short excursion with which he is charged, and which cannot be denied was made in performance of duty devolved upon him by the orders of the agent who appointed him to the command of the police at that point, he neither gained or sought advantage," and that it was "error to hold that, under the circumstances of the entry into the Territory, he was disqualified thereby."

It was held in Smith *v.* Townsend, 148 U. S. 490, upon the statutes governing this matter, that:—

"The general language used in these sections indicates that it was the intent to make the disqualifications universally absolute. It does not say 'any person who may wrongfully enter' etc., but 'any person who may enter,' 'rightfully or wrongfully,' is implied. There are special reasons why it must be believed that Congress intended no relaxation of these disqualifications on the part of those on the

company's right of way, for it is obvious that when a railroad runs through unoccupied territory like Oklahoma, which on a given day is opened for settlement, numbers of settlers will immediately get into it, and large cities will shortly grow up along the line of the road; and it cannot be believed that Congress intended that they who were on this right of way in the employ of the railroad company should have a special advantage of selecting tracts, just outside that right of way, and which would doubtless soon become the sites of towns and cities."

This determination of the Supreme Court upon the statutes in question has been affirmed in Payne *v.* Robinson, 169 U. S. 323, and Calhoun *v.* Violet, 173 U. S. 60.

40 We therefore conclude that the acting Secretary of the Interior misapplied the law, and that it was properly and correctly interpreted in the opinion of the register and receiver of the United States land office at Oklahoma city, to the effect that "his orders were to prevent settlement upon the Oklahoma lands. When he crossed the land upon this tract before the legal hour, he became a trespasser, the same as any other person not clothed with authority."

We feel the less hesitation in reversing the conclusion of the last tribunal of the Land Department "on review" not only because the conclusion we now arrive at is that which must necessarily be arrived at upon the facts, but also because it was the one accepted by the Secretary of the Interior, as well as the Commissioner of the General Land Office.

It is however, argued that the answer and cross-petition of the defendant in error, Mary Hall, fail to show that she is entitled to relief, since they did not allege that she is either a native-born or a naturalized citizen of the United States, and that therefore the averments of her pleading fail to show that she is qualified to make final proof.

This objection fails to take into view the express provision of section 2 of the act of Congress of February 10th, 1855, which declares that:—

"Any woman who might lawfully be naturalized under the existing laws married, or who shall be married to a citizen of the United States, shall be deemed and taken to be a citizen."—Revised Statutes of the United States, section 1994.

And it is held in Kelly *v.* Owen, 7th Wall. (U. S.) 496, that this act of Congress confers the privilege of citizenship upon women married to citizens of the United States, and that under it, the citizenship of the husband, whenever it exists, confers citizenship upon the wife.

It is also contended that the answer and cross-petition in failing to show that Gilman C. Hall and his wife lived upon said land for five years or more, is insufficient.

It was not necessary for Gilman C. Hall to have lived on the land for five years. It is shown, however, that he resided upon the land from October 1889, and that he resided thereon up to the time of his death, and that his wife, the defendant herein, has resided thereon

continuously up to the present time, and has made valuable improvements thereupon. This is a sufficient averment of residence upon the circumstances of this case. If it should be held otherwise, then, if a husband should die before the lapse of the period necessary to perfect and complete his residence, the statute authorizing his widow to acquire title by virtue of his citizenship and her own, would be rendered void, which was certainly not the purpose of Congress.

It is also contended that when the trial court overruled the demurrer of the plaintiff and the plaintiff elected to stand upon his demurrer, and the trial court thereupon rendered final judgment in the case, that this rendition of final judgment was reversible error. We cannot sustain this view.

It was held in McNasser *v.* Sherry, 1 Colo. 12, and in Bates *v.* Williams, 43 Ill. 494, that if the defendant does not plead on overruling demurrer to a declaration, default judgment should be entered. And it is generally held that when a demurrer is overruled and the demurrant does not plead over or answer, but stands upon and abides by his demurrer, the submission of the case upon the demurrer is a final submission and the judgment thereupon is final.—6th Enc'y of Pl. & Pr. p. 366, and cases there cited.

The plaintiff attached to his amended petition a copy of the final receipt or certificate issued to him for the land. It showed that, after the litigation in the Land Department was over, namely, on the 8th day of December, 1897 he had paid out the sum of $3.56, the balance of payment required by law for the entry of the land as a homestead under section 2291 of the Revised Statutes of the United States, and he now contends that he should have judgment here, because the answer and cross-petition wholly fails to allege that the defendant in error offered to pay or tender into court this amount of land-office fees for the final proof paid by Potter.

41 The subject of the contention was 140 acres of valuable land. The controversy in the Land Department was carried on through a period of 7 or 8 years. It is now renewed in the courts, and is recognized by both parties as of much importance. Even if the case was one which required the tender of these fees by the defendant in her cross-petition, she would not be denied her equity, because of the omission to tender so trivial a sum. The court, by its final decree, can require the repayment of the sum mentioned, but it would be unworthy the dignity of this court, in so serious a litigation, while sitting in equity and endeavoring to administer justice in matters of grave interest to the parties, to hold that this homestead should now be turned over to the plaintiff, who is not entitled to it under the statutes of the United States, because the defendant failed to make an express tender of a sum so trivial. To make such a ruling would be, not to administer equity, but to use the power and jurisdiction of the court to do injustice, and to promote contention and vexatious litigation, upon points of trivial interest and consequence.

The judgment of the trial court will be affirmed. All the justices concur, except Irwin, J., who presided below.

42 Be it further remembered that on the 26th day of August A. D. 1901, there was filed in said cause, the plaintiff's assignment of error- in words and figures following, to wit:

43 In the Supreme Court of the Territory of Oklahoma.

THOMAS W. POTTER, Plaintiff in Error,
vs.
MARY HALL, Defendant in Error.

Assignment of Errors.

Now, on this 20th day of August A. D. 1901, comes the said plaintiff in error by J. H. Everest and John W. Shartel, his solicitors and says that the decree and judgment rendered in this cause in this court on the 6th day of July A. D. 1901, are erroneous and against the just rights of the said plaintiff, for the following reasons:

First. Because this court erred in affirming the judgment and order of the court below, appealed from.

Second. The court erred in holding that as a matter of law that the acts of plaintiff amounted to a disqualification to make entry of the lands in controversy under the homestead laws of the United States.

Third. The court erred in affirming the action of the court below in overruling the demurrer of the plaintiff in the court below to the answer and cross-petition of the said Mary Hall, the defendant in the court below, to wit: the district court of the county of Canadian and Territory of Oklahoma.

Fourth. The court erred in affirming the action of the court below in overruling the demurrer of the plaintiff in that court because and for the reasons that the answer and cross-petition of the defendant in the court below failed to state sufficient grounds for equitable relief or for the cancellation of the patent issued to the plaintiff for the land in controversy by the Government of the United States.

44 Fifth. This court erred in sustaining the action of the district court of Canadian county in rendering judgment and decree for the transfer of the legal title of the land in controversy from the plaintiff to said defendant.

JOHN W. SHARTEL AND
J. H. EVEREST,
Solicitors for Plaintiff in Error.

Endorsed on back as follows: 1054. Thomas W. Potter *vs.* Mary Hall. Assignment of errors. Filed Aug. 26, 1901. Benj. F. Hegler, clerk supreme court.

45 Be it further remembered that on the 26th day of August, 1901, there was filed in said cause a petition for appeal, order granting the same and affidavits of value in controversy, in words and figures following, to wit:

46 In the Supreme Court of the Territory of Oklahoma.

THOMAS W. POTTER, Plaintiff in Error,
vs.
MARY HALL, Defendant in Error.

Comes now the above-named plaintiff in error, Thomas W. Potter, and considering himself aggrieved by the decree and judgment made and entered in this cause on the 6th day of July A. D. 1901, does hereby appeal from said judgment, order and decree to the Supreme Court of the United States for the reasons specified in the assignment of errors which is filed herewith, and prays that this his appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said order, and decree was made, duly authenticated, may be sent to the Supreme Court of the United States, and that the amount of the appeal bond which shall operate as a supersedeas be fixed, and a reasonable time allowed in which to enter the same; the said plaintiff also files herewith the affidavits of the amount in controversy, showing that the amount in dispute herein exclusive of costs exceeds the sum of five thousand dollars ($5,000.00).

JOHN W. SHARTEL AND
J. H. EVEREST.

The foregoing claim of appeal, together with the affidavits of Thomas W. Potter and Jeff Potter, and R. R. Hickox and A. E. Saxey and Wm. Youard, H. K. Ricker and A. C. Springs as to the value or amount in controversy in this action is submitted to me, this 24 day of August A. D. 1901, and upon examination thereof, I find that the value or sum in controversy, exclusive of costs exceeds the sum of five thousand dollars ($5,000.00); and the foregoing appeal is hereby by me allowed, and the said appeal granted, and the amount of the plaintiff's appeal bond which shall operate as a supersedeas, is fixed at the sum of one thousand — ($1,000.00), as conditioned by law and rule of the Supreme Court of the United States, and which shall be filed in the office of the clerk of
47 the supreme court of Oklahoma Territory, and approved by the chief justice or one of the associate justices of said court on or before ten days from this date.

B. F. BURWELL,
Associate Justice Supreme Court of Territory of Oklahoma.

Attest: BENJ. F. HEGLER,
[SEAL.] *Clerk Supreme Court.*

Endorsed on back as follows: 1054. Thomas W. Potter *vs.* Mary Hall. Petition for appeal and order allowing appeal. Filed Aug. 26, 1901. Benj. F. Hegler, clerk supreme court.

48 In the Supreme Court of the Territory of Oklahoma.

THOMAS W. POTTER, Plaintiff in Error,
vs.
MARY HALL, Defendant in Error.

Affidavit.

Personally appeared before me, the undersigned authority within and for the county aforesaid, Thomas W. Potter, who after being by me first duly sworn, deposes and says: That he is the plaintiff in error in the above-entitled action, that the value of the subject-matter of said controversy, to wit: the south half of the northwest quarter and lots three (3) and four (4) of section four (4) in township twelve (12) N. of range seven (7) west Indian meridian, in Canadian county, Oklahoma Territory, exceeds the sum or amount of five thousand dollars ($5,000.00) lawful money of the United States, and is of the value of six thousand dollars ($6,000.00) at this date.

That affiant makes this affidavit for the purpose of fixing the value of the said property involved in said suit for the purpose of showing that said action is appealable from the supreme court of the Territory of Oklahoma to the Supreme Court of the United States of America.

THOMAS W. POTTER.

Subscribed and sworn to before me this 14th day of August, 1901.
[SEAL.] NEWTON AVEY,
Notary Public.

My commission expires March 9, 1902.

Indorsed on back as follows: Thomas W. Potter *vs.* Mary Hall. Affidavit as to value in controversy. Filed Aug. 26, 1901. Benj. F. Hegler, clerk supreme court.

49 In the Supreme Court of the Territory of Oklahoma.

THOMAS W. POTTER, Plaintiff in Error,
vs.
MARY HALL, Defendant in Error.

Affidavit.

TERRITORY OF OKLAHOMA, } *ss:*
Canadian County,

Personally appeared before me the undersigned authority within and for the county and Territory aforesaid, Jeff Potter, being by me first duly sworn deposes and says, that he resides in the county of Canadian and Territory of Oklahoma, that he is well acquainted personally with lots three (3) and four (4) and south half of the northwest quarter of section four (4) in township twelve (12) N. of range seven (7) west in Canadian county, Oklahoma Territory, and

has been acquainted with said tract for more than five years last past and that he knows the value thereof.

That on this day, to wit: the 15th day of August, 1901. said tract of land is worth the sum of five thousand dollars ($5,000.00) and more, to wit: being of the value of six thousand — ($6,000.00) and further dependent sayeth not.

JEFF POTTER.

Subscribed and sworn to before me this 15th day of August, 1901.

[SEAL.] A. E. SAXEY,
Notary Public.

My commission expires April 16, 1904.

Endorsed on back as follows: 1054, Thomas W. Potter *vs.* Mary Hall. Affidavit as to value in controversy. Filed Aug. 26, 1901. Benj. F. Hegler, clerk supreme court.

50 In the Supreme Court of the Territory of Oklahoma.

THOMAS W. POTTER, Plaintiff in Error,
vs.
MARY HALL, Defendant in Error.

Affidavit.

TERRITORY OF OKLAHOMA, *Canadian County,* } *ss:*

Personally appeared before me the undersigned authority within and for the county and Territory aforesaid R. R. Hickox, being by me first duly sworn deposes and says that he resides in the county of Canadian and Territory of Oklahoma, that he is well acquainted personally with lots three (3) and four (4) and south half of the northwest quarter of section four (4) in township twelve (12) N. of range seven (7) west in Canadian county, Oklahoma Territory, and has been acquainted with said tract for more than five years last past and that he knows the value thereof.

That on this day, to wit: the 15th day of August, 1901, said tract of land is worth the sum of five thousand dollars ($5,000.00) and more, to wit: being of the value of six thousand dollars ($6,000.00) and further deponent sayeth not.

R. R. HICKOX.

Subscribed and sworn to before me this 15th day of August, 1901.

[SEAL.] A. E. SAXEY,
Notary Public.

My commission expires April 16, 1904.

Endorsed on back as follows: 1054, Thomas W. Potter *vs.* Mary Hall. Affidavit as to value in controversy. Filed Aug. 26, 1901. Benj. F. Hegler, clerk Supreme Court.

51 In the Supreme Court of the Territory of Oklahoma.

THOMAS W. POTTER, Plaintiff in Error,
vs.
MARY HALL, Defendant in Error.

Affidavit.

TERRITORY OF OKLAHOMA, } ss:
Canadian County, }

Personally appeared before me the undersigned authority within and for the county and Territory aforesaid, Wm. Youard, being by me first duly sworn deposes and says, that he resides in the county of Canadian and Territory of Oklahoma, that he is well acquainted personally, with lots three (3) and four (4) and south half of the northwest quarter of section four (4) in township twelve (12) N. of range seven (7) west in Canadian county, Oklahoma Territory, and has been acquainted with said tract of land for more than five years last past, and that he knows the value thereof. That on this day, to wit: August 15, 1901, said tract of land is worth the sum of five thousand dollars ($5,000.00) and more, to wit: being of the value of six thousand dollars ($6,000.00) and further deponent sayeth not.

WM. YOUARD.

Subscribed and sworn to before me this 15th day of August, 1901.

[SEAL.] A. E. SAXEY,
Notary Public.

My commission expired April 16, 1904.

Endorsed on back as follows: 1054, Thomas W. Potter *vs.* Mary Hall. Affidavit as to value in controversy. Filed Aug. 26, 1901. Benj. F. Hegler, clerk supreme court.

52 In the Supreme Court of the Territory of Oklahoma.

THOMAS W. POTTER, Plaintiff in Error,
vs.
MARY HALL, Defendant in Error.

Affidavit.

TERRITORY OF OKLAHOMA, } ss:
Canadian County, }

Personally appeared before me the undersigned authority within and for the county and Territory aforesaid H. K. Ricker being by me first duly sworn deposes and says that he resides in the county of Canadian and Territory of Oklahoma, that he is well acquainted personally with lots three (3) and four (4) and south half of the

northwest quarter of section four (4) in township twelve (12) N. of range seven (7) west in Canadian county, Oklahoma Territory, and has been acquainted with said tract of land for more than five years last past, and that he knows the value thereof. That on this day, to wit: August 15, 1901, said tract of land is worth the sum of five thousand dollars ($5,000.00) and more, to wit: being of the value of six thousand dollars ($6,000.00) and further deponent sayeth not.

H. K. RICKER.

Subscribed and sworn to before me this 15th day of August, 1901.

[SEAL.] A. E. SAXEY,
Notary Public.

My commission expires April 16, 1904.

Endorsed on back as follows: 1054, Thomas W. Potter *vs.* Mary Hall. Affidavit as to value in controversy. Filed Aug. 26, 1901. Benj. F. Hegler, clerk supreme court.

53 In the Supreme Court of the Territory of Oklahoma.

THOMAS W. POTTER, Plaintiff in Error,
vs.
MARY HALL, Defendant in Error.

Affidavit.

TERRITORY OF OKLAHOMA, *Canadian County,* } *ss:*

Personally appeared before me the undersigned authority within and for the county and Territory aforesaid A. C. Springs, being by me first duly sworn, deposes and says that he resides in the county of Canadian and Territory of Oklahoma, that he is well acquainted personally with lots three (3) and four (4) and south half of the northwest quarter of section four (4) in township twelve (12) N. of range seven (7) west in Canadian county, Oklahoma Territory, and has been acquainted with said tract of land for more than five years last past, and that he knows the value thereof. That on this day, to wit: August 15, 1901, said tract of land is worth the sum of five thousand dollars ($5,000.00) and more, to wit: being of the value of six thousand dollars ($6,000.00) and further deponent sayeth not.

A. C. SPRINGS.

Subscribed and sworn to before me this 15th day of August, 1901.

[SEAL.] A. E. SAXEY,
Notary Public.

My commission expires April 16, 1904.

Endorsed on back as follows: 1054. Thomas W. Potter *vs.* Mary Hall. Affidavit as to value in controversy. Filed Aug. 26, 1901. Benj. F. Hegler, clerk supreme court.

54 Be it remembered that on the 26th day of August, 1901, there was filed in said cause a supersedeas bond in words and figures following, to wit:

55 In the Supreme Court of the Territory of Oklahoma.

THOMAS W. POTTER, Plaintiff in Error,
vs.
MARY HALL, Defendant in Error.

Know all men by these presents, that we, Thomas W. Potter, as principal, and The United States Fidelity and Guaranty Company, a corporation, as sureties, are held and firmly bound unto the defendant in error, Mary Hall, above named, in the full and just sum of one thousand dollars ($1,000.00), to be paid to the said Mary Hall, her representatives or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 24th day of August, A. D. 1901.

The conditions of this obligation are as follows: Whereas on the 6th day of July, A. D., 1901, at a session of the supreme court of the Territory of Oklahoma, held at the city of Guthrie, in said Territory in an action pending in said court between the above-bounden principal as plaintiff in error and the above-named obligee as defendant in error, there was a judgment, order and decree rendered against the above-bounden principal in favor of the above-named obligee affirming a certain judgment of the district court of the county of Canadian and Territory of Oklahoma, in a case theretofore pending in said district court, wherein the above-bounden principal was plaintiff and the above-named obligee was defendant, rendered against the prayer of the said plaintiff in the court below for relief therein demanded, and the said plaintiff in error having filed his petition for appeal, together with his assignment of error on the appeal to the Supreme Court of the United States to said judgment from the supreme court of said Territory, and the said appeal being granted and the supersedeas bond being allowed to stay the operation of said judgment during the pendency of said appeal, and the citation being duly issued
56 to the obligee, Mary Hall, cited for a session of the Supreme Court of the United States of America, to be holden at the city of Washington on the 24th day of September A. D. 1901; now, the condition of this obligation is such that if the said above-named principal shall prosecute his said appeal to effect and answer all damages and costs, including all interest, and pay all damages that the said obligee may sustain on account of the suspension of the said judgment aforesaid, during the pendency of

said appeal if he fails to make his plea good then the above obligation to be void; else to remain in full force and effect.

THOMAS W. POTTER, *Principal.*
THE UNITED STATES FIDELITY AND GUARANTY COMPANY,
[SEAL.] By T. M. UPSHAW, *Its Attorney-in-fact.*
Sureties.

The foregoing bond is hereby approved by me on this the 24th day of August, 1901.

B. F. BURWELL,
Asso. Jus. Sup. Ct. of Oklahoma Territory.

Endorsed on back as follows: 1054—Thomas W. Potter *vs.* Mary Hall—Supersedeas bond—Filed Aug. 26, 1901—Benj. F. Hegler, clerk supreme court.

57 Be it further remembered that on the 11th day of September, 1901, there was filed in said cause a copy of the citation, which said copy is in words and figures following, to wit:

58 In the Supreme Court of the Territory of Oklahoma.

THOMAS W. POTTER, Plaintiff in Error,
vs.
MARY HALL, Defendant in Error.

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States of America, to be holden at the city of Washington, on the 24th day of September, 1901, pursuant to an appeal filed in the supreme court of Oklahoma Territory, wherein Thomas W. Potter is appellant, and you are appellee, to show cause, if any there be, why the judgment, order and decree rendered and entered against said appellant, as in his petition of appeal mentioned should not be corrected and speedy justice be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 24th day of August, in the year of our Lord one thousand nine hundred and one, and the Independence of the United States of America, the one hundred and twenty-sixth.

B. F. BURWELL,
Associate Justice of the Supreme Court of Oklahoma Territory.

Attest:
[SEAL.] BENJ. F. HEGLER,
Clerk Supreme Court.

We hereby acknowledge that the above citation was served on us this 29th day of August, A. D. 1901.

F. E. GILLETT,
M. D. LIBBY,
Solicitors for Appellee.

Filed Sept. 11, 1901.

BENJ. F. HEGLER,
Clerk Supreme Court.

Indorsed on back as follows: 1054 Thomas W. Potter *vs.* Mary Hall. Citation.

59 UNITED STATES OF AMERICA, } *ss:*
Territory of Oklahoma, }

I, Benj. F. Hegler, clerk of the supreme court of the Territory of Oklahoma, do hereby certify that the above and foregoing pages numbered from one to fifty-eight, inclusive, is a full, true and complete transcript of the record and all proceedings in said supreme court of the Territory of Oklahoma, in the case of Thomas W. Potter, plaintiff in error, against Mary Hall, defendant in error, as the same appear upon the files and of record in the supreme court of the Territory of Oklahoma.

In testimony whereof, I have hereunto subscribed my name and caused the seal of said court to be affixed, at my office, in the city of Guthrie, on this 16th day of September A. D. 1901, and of the Independence of the United States of America the one hundred and twenty-sixth.

[Seal Supreme Court, Territory of Oklahoma.]

BENJ. F. HEGLER,
Clerk Supreme Court of Oklahoma Territory.

Endorsed on cover: File No. 18,269. Oklahoma Territory supreme coart. Term No. 416. Thomas W. Potter, appellant, *vs.* Mary Hall. Filed September 26th, 1901.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

THOMAS W, POTTER, APPELLANT,

vs.

MARY HALL.

BRIEF OF APPELLANT.

STATEMENT OF FACTS.

This case originated in the District Court in the County of Canadian and Territory of Oklahoma by the appellant as plaintiff filing in that Court a statutory petition in ejectment to recover possession of the N. W. ¼ of Section 4, Township 12, North of Range 7 West. (For copy of petition see printed record page 3.) To this petition the appellee filed in answer a cross-petition alleging that she is the widow of Gilman C. Hall, who was a homestead settler upon the land in controversy, and that the plaintiff filed contest against Mr. Hall's entry upon the ground of prior settlement; that in the hearing before the Register and Receiver it was found and recommended by the Register and Receiver that the appellant is disqualified from acquiring any right in the land in controversy by reason of having entered upon and occupied the lands in the Oklahoma country

prior to the noon of April 22, 1889; that an appeal was filed to the Hon. Commissioner of the General Land Office which was sustained and the land awarded to Potter; that an appeal was then taken by Hall to the Hon. Secretary of the Interior Department which was sustained and the land awarded to Hall, but afterwards upon Potter's motion for review, overruled, and it was held by the Hon. Secretary that the plaintiff was not disqualified from making entry on said land and the said lands were awarded to the plaintiff Potter, it having been found that he was the prior settler thereon; that patent had been issued from the government of the United States to the said plaintiff, and that it was by reason of the misapplication of the law to the facts found that the plaintiff secured said patent, alleging that the same was the property of the defendant by law and equity, and that the plaintiff held only the naked title in trust for the use and benefit of the said Defendant Hall, and prayed for a decree directing the plaintiff to convey the lands to the defendant.

Copies of the opinion of the Register and Receiver and the two opinions of the Secretary of the Interior are attached to the answer and cross-petition (See printed record, pages 4 to 13, inclusive, for copy of cross-petition with exhibits). To this answer, the plaintiff filed a demurrer for want of facts to constitute either defense or affirmative right of action, which demurrer was overruled, and exception taken by the plaintiff and plaintiff electing to stand upon such demurrer, decree passed in

favor of the defendant directing the plaintiff to convey the lands to the defendant, to which exceptions were duly preserved (See page 14 of record for decree) A petition in error was filed in the Supreme Court of the Territory of Oklahoma and that court affirmed the judgment of the district court (See printed record, page 17, for the opinion of the Territorial Supreme Court.)

From the judgment of the Territorial Supreme Court an appeal is filed in this court. The entire case turns upon the Exhibits attached to the defendant's cross-petition.

These decisions attached as exhibits to said answer and cross-petition are as follows:

Copy.

United States Land Office,
Oklahoma City, O. T., November 7, 1891.

Thomas W. Potter,	Envolving H. E. No. 5077
vs.	for N. W. ¼; Sec. 4, Tws. 12
Gilman C. Hall.	N.; Range 7 W.

"Ex. 'A.'"

This tract of land was originally involved in the townsite applications of town of Harrison, which matter was finally disposed of by the Hon. Commissioner's letter "G" of March 11, 1891, leaving this tract of land to be disposed of between the agricultural claimants.

Gilman C. Hall made H. E. No. 5077 for said tract on Jan. 13, 1890.

Thomas W. Potter filed affidavit of contest against

the town-site application on May 8th, 1889, alleging prior settlement.

On March 4th, 1890, Potter filed affidavit of contest against the entry of Hall in which he alleges prior settlement on April 22, 1899, that he made application to enter said land (tract) on May 7th, 1889, which was rejected for conflict with the previous town-site application, from which action he appealed, that said Hall was a soldier in the regular army and could not establish a legal residence on said tract and that said Hall has abandoned said tract. A number of other allegations are embraced in said contest which are not material and state no cause of action.

The cause was set for hearing and both parties appeared, waived notice, and submitted their testimony. As we understand this case the issues involved are: First: The prior settlement of Potter and incident thereto his qualifications as a homesteader. Second: The qualifications of Hall as a hometead entryman. Third: The abandonment of Hall or failure to establish residence as required by law.

Under the evidence submitted by both parties we find that Potter made settlement upon said tract on the 22nd day of April, 1889, and that he has established residence and maintained the same as required by the homestead laws.

That Hall established residence upon said tract with his family in October, 1889, and has maintained

said residence to the time of trial, though he has been absent most of the time on military duty.

As to the questions of Potter's qualifications, it is shown that for some time previous to the opening of Oklahoma to settlement he has been in the employ of the Indian agent in charge of the Cheyenne and Arapahoe agency, which reservation adjoins the Oklahoma lands on the west. On the morning of April 22, 1889, he was directed by the Indian agent to take charge of 15 Indian policemen and proceed to the east line of the Cheyenne and Arapahoe reservations and preserve order and prevent any settlement on the same. In pursuance of this order, Potter, went to the vicinity of this land on the forenoon of April 22nd, 1889, and during said forenoon went across the line and onto the said tract and ordered persons off the same. Immediately after twelve o'clock he made settlement upon said tract. The authority of Potter obtained from the Indian agent, was only coextensive with the Cheyenne and Arapahoe Indian reservation and did not extend to the Oklahoma lands. His orders were to prevent settlement being made on the reservation and not that he should prevent settlement upon the Oklahoma lands. When he crossed the land onto this tract before the legal hour, he became a trespasser, the same as any other person not clothed with authority. The fact that he exhibited anxiety to keep this tract clear and exceeded his authority so far as to leave the reservation and order people off of this tract would raise a very strong influence (in-

ference) that he had this particular tract in view and intended to settle upon it.

The evidence fails to show that any very valuable or permanent improvements have been made upon this tract by either claimant. In view of all the facts we think the equities are with the entryman, Hall, and that Potter is disqualified from making homestead entry for the said tract.

We therefore recommend that the contest of Potter be dismissed, his application to enter rejected and that the homestead entry of Hall remain intact. 30 days are allowed for appeal.

JNO. H. BURFORD, Register.
J. C. DELANEY, Receiver.

Copy.

Ex. B. R. B.

Thomas W. Potter,
vs.
Gilman C. Hall,

February 19, 1894.

The Commissioner of the General Land Office.

Sir: This record presents the appeal of Mary Hall, widow of Gilman C. Hall, deceased, from your office, decision dated July 7th, 1892, in the case of Thomas W. Potter vs. said Gilman C. Hall, involving the S. 1-2, N. W. 1-4 and lots 3 and 4 section 4, twp. 12, N. R., 7, W., Oklahoma City, Oklahoma.

Also the controversy arose upon contest alleging

prior settlement and also that Hall being in the military service of the United States was not qualified as a homesteader, and that he, Hall, had abandoned the land, initiated, March 4th, 1890, against Hall's homestead entry made for the same, January 13, 1890.

By its said decision your office reversed that of the register—receiver sustained Potter's contest and held the entry of Hall for cancellation. The pending appeal is from this judgment.

This history of the case and the material facts are set out in the decision appealed from and need not be restated in detail. The tract in question formed a part of the lands in Oklahoma which were opened to settlement at noon on April 22nd, 1889; shortly before this date, Potter had been appointed by the Indian agent of the Cheyenne and Araphoe agency as assistant chief of police, with instructions to proceed to the east line of the reservation, preserve order and prevent any settlement on the same. The east line of the Cheyenne and Arapahoe reservation is also the west line of the lands opened for settlement as aforesaid and is within possibly a quarter of a mile from the tract in question. On the morning of April 22, 1889, some three or four hours before the hour of noon, Potter whom it seems was at said line, seeing some freighters camped on the land involved went thereon to order them off, he then returned to the line and at the hour of noon started in the race for a claim, he reached the land before any of his competitors, and as he states commenced his set-

tlement at one-half or one minute after 12 o'clock.

In my opinion the facts just stated sustain the conclusion reached by the local officers to the effect that Potter was not qualified to enter the tract in question, by going into the Territory on the morning of April 22nd, 1889, before the hour when the lands therein were opened to settlement, he necessarily secured an opportunity to observe the various tracts lying near the line and the ways of reaching them, and this taken in connection with the fact that at the said hour he went directly from the line to the land in question makes it plain in my mind that if he did not previously select the tract of land in dispute, he obtained information that gave him an advantage over rival claim-seekers. It follows under the prevailing rulings (Dean vs. Simmons, 17 L. D. 536), and cases cited, that his application to enter the tract in question must be rejected.

The fact that the entryman, Hall, was in the army is not of itself sufficient to invalidate his entry, (Shannon vs. Hoffman, 4 L. D. 399) nor does the evidence, (Potter's claim being eliminated from the case) warrant its cancellation on the ground of abandonment.

The entry of Hall will accordingly remain intact. The foregoing deposition of the case renders it (unnecessary) for me to discuss the other questions presented by the record. The decision appealed from is reversed. Herewith I return the papers.

Very respectfully,

HOKE SMITH, Secretary.

Exhibit "C."

Department of the Interior,

Washington, D. C., December 5, 1895.

Thomas W. Potter, vs. Gilman C. Hall. } On Review.

Sir: On January 13, 1890, Gilman C. Hall made homestead entry on S. 1-2 of the N. W. 1-4 and lots 3 and 4, section 4, twp. 12, N. R. 7 W. of the land district of Oklahoma City, Oklahoma.

On March 4, 1890, Thomas W. Potter filed an affidavit of contest alleging prior settlement and that Hall had abandoned the land, and was disqualified by reason of his being in the military service of the United States.

The case having reached this department through the course of procedure it was here held February 19, 1894, L. & R. N. O. 281, p. 201, that Potter having entered the Territory of Oklahoma before 12 o'clock noon April 22nd, 1889, was disqualified to make homestead entry therein and, that the evidence did not warrant the cancellation of Hall's entry on the ground of abandonment. Potter has filed a motion for review. the various grounds of which are for the purpose of argument condensed by his counsel into the two following:

"1. In holding as a fact that Potter by entering the Territory prior to noon, necessarily or in any way,

secured an opportunity to observe the various tracts of land lying near the line, or thereby secure any advantage over other claim-seekers and particularly over Gilman C. Hall."

"2. In holding that by reason of entering said Territory in the line of duty, Potter was disqualified under the law from entering any land, 'in the Territory.' "

The decision on review sets out a statement of the facts on which its conclusions are based as follows:

The tract in question formed a part of the lands in Oklahoma which were opened to settlement at noon on April 22nd, 1889. Shortly before this date Potter had been appointed by the Indian agent at the Cheyenne and Arapahoe agency as assistant chief of police, with instructions to proceed to the east line of the reservation to preserve order and prevent any settlement on the same. The said east line of the Cheyenne and Arapahoe reservations is also the west line of the lands opened to settlement, as aforesaid, and is within possibly a quarter of a mile from the tract in question.

On the morning of April 22nd, 1889, some three or four hours before the hour of noon, Potter, whom it seems was at said line, seeing some "freighters" camping on the tract involved, went thereon and ordered them off, he then returned to the line and at the hour of noon started in the race for the claim. He reached the land before any of his competitor and as he states commenced his settlement at one-half or one minute after twelve o'clock.

Accepting this statement as correct and a re-examination of the record satisfies me of its correctness so far as it goes, I scarcely think the conclusion warranted that he necessarily secured an opportunity to observe the various tracts of land lying near the land and the way of reaching them, so that he obtained information that gave him an advantage over rival claim-seekers. He had been employed at the Cheyenne and Arapahoe agency near by since 1883, and for six years before the opening of the country to settlement, he had lived in close proximity to the land in dispute. He had nothing to gain or to learn. Therefore, by the short excursion with which he is charged and which it cannot be denied was made in the performance of duty devolved upon him by the orders of the agent who appointed him to the command of the police at that point. He neither gained or sought advantage and it was error to hold that under the circumstances of entry into the Territory, he was disqualified thereby.

Proceeding now to consider the case on its merits, the evidence seems conclusive that Potter was the prior settler, that he established residence upon the land on April 22, 1889, the day of the opening, and maintained it for several months, may be considered as proven.

The efforts of the defendant, Hall, were mainly directed on this branch of the case, to showing abandonment by Potter, but I do not think the testimony sustains his contentions, the latter was called away from

home on business during the fall of 1889, and the winter following, but those absences were not of a character to indicate a purpose to abandon his homestead. During that period he made two trips to Carlisle, Pa., in charge of children destined for the Indian school located at that place and spent the winter there in doing work in some capacity, returning in the spring. He is a young man without any family and was accumulating means and swears that his absence from the land was rendered necessary by his financial condition.

Both, Potter and Hall have improvements, in neither case very expensive or valuable, but sufficient for both to show good faith, but the former's possession is the stronger by virtue of the priority of his settlement. That fact, however, is sufficient to determine the controversy in his favor.

The decision heretofore rendered is therefore revoked, and set aside and your office decision holding Hall's entry for cancellation is affirmed. The papers in the case are herewith returned.

Very respectfully,

JOHN M. REYNOLDS,

Acting Secretary.

The appellant's assignment of errors is found on page 24 of the printed record and is as follows:

"Now, on the 20th day of August A. D. 1901, "comes the said plaintiff in error by J. H. Everest and "John W. Shartell, his solicitors and says that the de-"cree and judgment rendered in this cause in this "court on the 6th day of July A. D. 1901, are erroneous "and against the just rights of the said plaintiff, for the "following reasons:

"First. Because this court erred in affirming the "judgment and order of the court below, appealed "from.

"Second. The court erred in holding that as a "matter of law that the acts of plaintiff amounted to a "disqualification to make entry of the lands in contro-"versy under the homestead laws of the United States.

"Third. The court erred in affirming the action of "the court below in overruling the demurrer of the "plaintiff in the court below to the answer and cross-"petition of the said Mary Hall, the defendant in the "court below, to-wit: the district court of the county of "Canadian and Territory of Oklahoma."

"Fourth. The court erred in affirming the action "of the court below in overruling the demurrer of the "plaintiff in that court because and for the reasons that "the answer and cross-petition of the defendant in the "court below failed to state sufficient grounds for "equitable relief or for the cancellation of the patent "issued to the plaintiff for the land in controversy by "the Government of the United States.

"Fifth. This court erred in sustaining the action "of the district court of Canadian county in rendering "judgment and decree for the transfer of the legal title "of the land in controversy from the plaintiff to said "defendant.

JOHN W. SHARTEL and
J. H. EVEREST,
Solicitors for Plaintiff in Error."

Under these assignments of errors we desire to discuss two propositions:

FIRST.

THE ANSWER AND CROSS-PETITION WAS INSUFFICIENT TO RAISE THE QUESTION SOUGHT:

(a) For failure to allege all the facts found in the departmental proceedings;

(b) For failure to allege the specific mistakes of law made in the Interior Department upon the facts found;

(c) For failure to offer to do equity in restoring to the plaintiff the legal expenses incurred in acquiring title to the land.

SECOND.

THE ACTS OF THE PLAINTIFF IN ENTERING THE OKLAHOMA COUNTRY ON THE MORNING OF THE DAY THOSE LANDS WERE THROWN OPEN TO SETTLEMENT DID NOT DISQUALIFY HIM FROM MAKING ENTRY ON ANY OF SUCH LANDS.

FIRST.—*The answer and cross-petition was insufficient to raise the question sought to be raised.*

(a) *For failure to allege all th facts found in the departmental proceedings;*

The answer and cross-petition sets out only the recommendation of the register and receiver. The first

opinion of the Secretary of the Interior reversing the decision of the Commissioner of the General Land Office and the decision of the Secretary upon review reversing his former decision and affirming the decision of the Commissioner of the General Land Office holding the Hall entry for cancellation and permitting Potter to file. We insist that without the decision of the commissioner of the General Land Office it is impossible to understand with clearness or certainty what the ruling of the Interior Department was, and because by reference it is seen that they are mutually dependent and that the omission of the opinion of the Commissioner which was affirmed makes it impossible to fairly ascertain what facts were actually found in the Interior Department.

(b) *For failure to allege the specific mistakes of law made in the Interior Department upon the facts found.*

It is a well settled doctrine of this court that in order to set aside the conclusion of the Interior Department in the sale and disposition of public lands by reason of its having committed a clear mistake of law in awarding the land to the wrong party that the mistake of law must be specifically pointed out and clearly alleged; this was not done.

Marquez vs. Frisbie, 11th. Otto. 473. (Vol. 25 Law. Ed. Page 800).

United States vs. Atherton, 12th. Otto, 372-375; (Law. Ed. Vol. 26, 214).

(c) *For failure to offer to do equity in restort-*

ing to the plaintiff the legal expense incurred in acquiring title to the land.

The record shows that upon making a final proof the plaintiff paid certain fees to the register and receiver. The law requires him in this process to pay certain other fees. (See Record, page 4; also Revised Statutes, sections 2290 and 2238). There was neither allegation of tender nor offer in the bill to refund nor did the decree in defendant's favor make any provision for refunding these charges. We think this is a case where an offer to do equity is a condition precedent to obtaining equity.

Thomas J. McQuiddy vs. Ware et al, 20th. Wall. 14-20. Law. Ed. Vol. 22, page 311.
Buchannon vs. Upshaw, 1 How. 56. Law Ed. Vol. 11, page 46.
Williams vs. Gibbes, 20th How. 535 Law Ed. Vol. 15, page 1013.

In addition to the fees required by law which Potter must have paid to acquire title, the record shows that Potter had improvements on the land which the court will know judicially were of some value. The Defendant Hall cannot expect to appropriate these in a court of equity, without compensation and her answer and cross-complaint nowhere, either specifically or generally offers to do this or to do equity.

SECOND.

THE ACTS OF THE PLAINTIFF IN ENTERING THE OKLAHOMA COUNTRY ON THE MORNING OF THE DAY THOSE LANDS WERE

THROWN OPEN TO SETTLEMENT DID NOT DISQUALIFY HIM FROM MAKING ENTRY ON ANY OF SUCH LANDS.

It is admitted in all of the findings that the plaintiff excepting only the question of his entry into the lands in question on the morning of the opening was in all respects a qualified entryman. It is also admitted that he initiated the first settlement upon the land in question. The substance of the first opinion of the Secretary of the Interior is that Potter was at the border of the land near the Cheyenne and Arapahoe Agency in charge of a squad of fifteen Indian policemen under orders from the agent to proceed to the line to preserve order and to prevent any settlement upon the same, and that seeing some campers located in the country, on, or near the land in question, he proceeded to where they were and ordered them out of the country, returning to the line and re-entering the country along with the other settlers at the hour of noon. It was the Secretary's opinion that this entry was for the purpose of, and that Potter did gain an advantage thereby. The second and final opinion finds that Potter was at the border of the land acting under orders from a Government officer, in charge of a squad of Indian policemen and for the purpose of preserving order and preventing settlement on the reservation or in the Oklahoma country prior to the hour of noon, and it is expressly found that Potter in going into the Oklahoma Country and ordering the settlers out

was proceeding strictly in the line of his duty. It is also found that Potter had been a resident of the country nearby for six years, had lived in sight of the land in controversy and had been familiar with it for years; that his excursion into the country on the morning of the opening was not for the purpose of gaining any advantage over the settlers and that he did not gain any advantage thereby. The Supreme Court of the Territory took the view that the case of Smith against Townsend compelled the construction of the Act of Congress opening Oklahoma to settlement, that no entry during the prohibited period into the Oklahoma country no matter how innocent could be explained or reasoned away; that the prohibition of the Act is absolute. The Interior Department at no time has taken that restricted view either of the act or of the effect of the decision in the Smith against Townsend case. It has been for a period of some eight or ten years extending the spirit of the act to cases not within its letter and excluding cases within the letter of the Act but not within its spirit. A few of the many instances will subserve to illustrate the settled construction adopted by the Interior Department.

Donnell vs. Kittrel, 15th. L. D. 580 was a case in which the settler in the night time and two days before the opening of the country to settlement wandered two miles inside of the Oklahoma territory and on discovery of his mistake immediately withdrew. The Secretary of the Interior held that he was not disqualified. "He neither 'took nor held possession' of any "land; he had no unlawful purpose in passing within the "line, and no one was injured thereby. He did not "enter within the line 'with a view and purpose of set-"tlement of any part thereof.' He gained no advan-"tage thereby, hence, the penalty provided by the "statute and the proclamation for one who violated the "spirit thereof for the purpose of gaining preference "should not be visited upon him."

Roff vs. Coplin, 18th. D. D. 128, was a case in which an entryman had for several years been grazing cattle in the Oklahoma country, and that about the time of the issuance of the President's proclamation he removed his cattle from the Oklahoma country, but on two occasions they strayed back in that country and on each occasion he went into the country and drove them out. The last occasion was in the immediate vicinity of the land in question but he was on account of his previous acquaintance with the country, not only being thoroughly familiar with the land in question but with the entire country, held not to be disqualified. In passing on this question the Assistant Attorney General says: "The thorough "knowledge of that vicinity gained by the defendant "prior to the inhibition imposed by the President's "message precludes the theory that the defendant went "into the territory on these two occasions for the pur-"pose of obtaining knowledge of the land or for any "other purpose than that stated. I do not think that "his presence there on these two occasions under the "circumstances should be construed to disqualify him,

"especially in view of the fact that he was compelled to "keep his stock out of the country."

In Higgins vs. Adams, 18th. L. D. 508, it was held that an entry made by a settler on the morning of the day of the opening going one-fourth of a mile into the country for the purpose of watering his team and upon completing his objeit, returning to the boundary and making an even start, did not disqualify the entryman.

In the matter of W. E. Morris, 22nd. L. D. 613, the applicant lived near the line between the Cherokee outlet and the Creek Nation and had habitually for years obtained water supply for his family and his stock from the Cherokee outlet and in the pursuit of this object solely had been within the outlet during the prohibited period. It was held that he was not disqualified from making entry to lands in that country.

In Curnutt vs. Jones 21st. L. D. 40, it was found that Jones was thoroughly familiar with the country and during the prohibited period had visited Oklahoma City post-office for the purpose of securing his mail which he had customarily received at that post-office. The entryman in that case built a foundation for a house on the land in controversy before the act opening the country to settlement was passed. It was held that he was not disqualified. It was also held in this case that his trips to Oklahoma City in view of his previous intimate knowledge of the country could not by any possibility add anything in the way of information or advantage. We call the court's attention especially to the case of Curnutt vs. Jones as being a complete review of all of the previous decisions of the Department covering different facts and bringing them into harmony around the one principle, that if the entry upon said lands is entirely disassociated from any attempt to gain advantage, and the party is outside of the country at the hour of the opening there is no disqualification, and the view is there brought into prominence that the

object of the law was to give every settler an equal chance in the race for a home, and if that is attained the law is fulfilled.

In Tipton vs. Maloney 23 L. D. 186, passing through the country by an entryman during the prohibited period along the highways so as to reach a point from which he desires to make a race does not disqualify him from acquiring title.

In Metz vs. Seeley, 21st. L. D. 148, the entryman came into the country in the employ of the A. T. & S. F. Railway Company conducting a boarding house. On the day previous to the opening of the country he went outside of the country and re-entered at the hour of noon on the day folliwing. In passing on this case the Honorable Secretary says:

"The crucial tests in these cases, when a prima facie showing is made that a person had violated the letter of the law by going inside the territorial limits, are: first, was such entry lawful? Second, was the party so coming within the letter of the law, outside at the hour of opening? Third, did his presence inside the territory during the prohibited period result in giving him an advanatge over others in reaching and selecting the land settled upon?

See also the case of McCormick vs. Turner 21st. L. D. 151. Lizzie H. McCormick, who held the entry resided at Fort Reno within the lands to be settled upon, with her father, and with permit of Secretary of War, as dairyman at the Fort and she assisted him in conducting his dairy. She was not acquainted with the land in controversy and on the day previous to the opening she left the country and returned at the proper time. The Interior Department held that she obtained no advantage over others by reason of her residence and presence in the Territory during the prohibited period and therefore did not violate the spirit of the law.

In Jackson vs. Garrett, 25th. L. D. 273, the Secretary refused to decide as a fact whether Garrett was on the land previous to the time of the opening because it is clear that he could not have had any object by so doing as he was outside of the country at the time of the opening and made the race along with other settlers, and having resided for several years in sight of the land on the outside of the country was not therefore disqualified even if he had been on the land between the Act of Congress and the Proclamation opening it to settlement.

See Hensly vs. Waner, 24th. L. D. 92. This case arose in Pottawatomie county, a part of which was opened for settlement and a part was set apart for an individual allotments of Indians. Hensley had for several years prior to the Act of Congress and Proclamation opening said land to settlement, been residing in that country as a tenant of Indians, but previous to the opening and during the prohibited period, he withdrew from the country and made the run along with the other settlers. There was a very serious question in this as to whether Hensley was rightfully in this country at any time, having leased without authority from the Indian Department. After Hensly removed from the country and during the prohibited period he went back into the country to look after crops which he had growing on his leased premises. It was held that Hensley was not disqualified. "It does not appear "that Hensly gain any advantage by his presence in "the country during the prohibited period. It is true "he resided within one mile and a half of the land he "now seeks to enter. It is also true that he had abun-"dant opportunity to gain a knowledge of the land be-"fore the date of the act opening the country to settle-"ment, March 3, 1891; and his residence within the "country after that period did not, I think, give him "any additional information."

In the case of Henderson vs. Smith 28. L. D. 303,

it was held that a homesteader who was hauling flour along a highway past the identical piece of land in controversy during the prohibited period but which was in sight of the entryman's premises outside of the land in controversy, and which could give him no additional information respecting the land, did not violate the act opening the Cherokee outlet to settlement. Numerous other cases are cited on various opinions from the Interior Department, cited in this brief and they all adhere to the doctrine that the entry must be within the mischief intended by the law in order to prove it within the law itself. This harmonizes indeed with the act of Congress and the Proclamation. It is also held that even though the entryman himself may not have been within the Territory if he employs some agency within the territory during the prohibited period whereby he gains advantage he is disqualified from entering the land. Thus, if a man by the aid of another obtains horses along the route he intends to follow so he may outstrip his competitors he is disqualified.

Blanchard et al vs. White, 13th. L. D., Page 66.
Guthrie Townsite vs. Paine, 13th. L. D., page 562.
White vs. Marvel, 18th. L. D., page 560.
Mullen vs. Porter, 20th L. D., page 334.

The reasoning of the court below turned upon three propositions:

FIRST:—A denial of the fact or mixed conclusion of law and facts that the entry was made in the discharge of Potter's duty.

SECOND:—The construction of the prohibition against entering the country as being absolute and that everything that is within its letter is within its spirit.

THIRD:—That this court in Smith against Town-

send, 148 U. S. 490, in Paine against Robinson, 169 U. S. 323, and Calhoun against Violet, 173 U. S. 60, took that view of the act in question.

We insist that the finding of the Secretary of the Interior that Potter went into the country to warn campers who had gotten over the line to get out in the discharge of his duty in charge of the border police was, at least, a mixed conclusion of law and fact if not strictly a finding of fact, which the courts must recognize as final and accept as conclusive.

Marquez vs. Frisbie, 11th. Otto. 473-479. (Law. Ed. Vol. 25, Page 800).

Lee vs. Johnson, 116 U. S., Page 48. (Law. Ed. Vol. 29-570).

Jonhson vs. Towsley, 13th. Wall. 72. (Law Ed. Vol. 20-485).

Warren vs. Van Brunt, 19 Wall. 646. (Law. Ed. Vol. 22-219).

United States vs. Minor, 114 U. S., 233. (Law. Ed. Vol. 29-110).

Under the authorities just cited we also insist that the finding that Potter's entry into the country was harmless so far as giving him any advantage over other settlers was concerned, is equally conclusive, and that the court below improperly brushed it aside.

All three of the decisions of this court cited involved the presence of persons within the prohibited area at the hour of the opening and they each expressly disclaimed a decision of the question as to what the effect would be if a person were innocently in the country

previous to the hour of the opening gaining no advantage thereby retiring therefrom and should start abreast of all others seeking homes. The Court below cited Smith against Townsend as authority for the construction that the prohibition is absolute upon everyone who entered the country during the prohibited period whether "rightfully or wrongfully" and whether they gained any advantage thereby or not and whether they made the race with other settlers or not, yet, a reading of Smith against Townsend shows that the opinion in that case expressly disclaims a decision upon that question, and that the question decided was: "It is enough now to hold that one who was within "the territorial limits at the hour of noon of April 22 "was, within both the letter and the spirit of the stat-"ute, disqualified to take a homestead therein."

We do not think that in view of this express disclaimer and in view of the import given to the language of the act in Smith against Townsend: "it was evidently "the expectation of Congress that they would be en-"forced in the spirit of equality suggested by the gen-"erality of the language," and by the strong intimation shown in the opinion that under such circumstances while a person might be within the letter of the act he would not be within the spirit, lends color to the reasonable view that an equitable construction of the act as intended by Congress would not disqualify Potter on account of the short excursion previous to the hour of opening. We submit the various rulings of the Interior Department above cited, reasoning upon this feature of the question as a sound exposition of a sound

construction of this law, where the result arrived at that even though one be not within its letter yet within its spirit he is disqualified and though one be within the letter and not within its spirit he is not.

We venture also the suggestion that the long line of adjudicated cases in the Interior Department on this subject ought not to be as lightly disturbed or brushed aside as was done in the court below. We also submit in this connection that even though it be within the province of the court below to set aside the conclusions of fact or mixed conclusions of law and fact of the Interior Department and to say that Potter's excursion into the country was not in the line of his duty yet that does not end the case. It is clear from the facts found that he so understood his duty and acted accordingly, and if he was acting upon a mistaken sense of his duty that certainly would not disqualify him from acquiring any of the lands, as we regard the entry into the country which disqualifies as necessarily bearing a relation to a violation of the spirit of the act in securing an undue advantage thereby, and we submit that the excursion on the morning of the opening made by Potter whether strictly legal and strictly authorized was innocently made, and entirely separated from any thought of getting the start of others in the final race or making a selection and that he is in as good a plight as the man who aimlessly or mistakenly wanders across the line but retires to the borders for the final race upon his discovery of his error. The construction

given to the act by the court below is at odds with the usual interpretation of remedial legislation and we submit has too much strictness to warrant its acceptance and that the decree of the court below should be reversed and remanded with instructions to dismiss the cross-petition of appellant.

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Attorneys for Appellant.
Solicitors for Appellant.

SUPREME COURT OF THE UNITED STATES,

January Term, 1903.

THOMAS W. POTTER, APPELLANT,

VS.

MARY HALL.

BRIEF OF APPELLEE.

DOES THE ANSWER AND CROSS PETITION FAIL TO STATE THE FACTS FOUND BY THE LAND DEPARTMENT?

The opinion rendered by the Register and Receiver, the decision of the Honorable Secretary of the Interior, and the decision of the Acting Secretary, are set forth in the said cross-petition. (See printed record, pages 7 to 10.) The facts are the same in each of these opinions or decisions. It is alleged in the cross-petition that the final decision (that of the Acting Secretary) was rendered upon the facts as found by the Register and Receiver, and that these facts are identical with

those shown in the several opinions attached to the cross-petition. (See printed record, p. 6.) The decision of the Secretary of the Interior purports to set forth the facts found by the Commissioner of the General Land Office. But if the facts alleged are not the facts as found by the Land Department, the demurrer did not raise the question.

DOES THE ANSWER AND CROSS-PETITION FAIL TO SET FORTH SPECIFICALLY THE MISTAKE OF LAW BY THE DEPARTMENT, BUT FOR WHICH MISTAKE THE LAND WOULD HAVE BEEN AWARDED TO THE APPELLEE?

It is alleged in said cross-petition that in the proceedings before the Land Department the right of Thomas W. Potter to said lands was "also contested upon the ground that he was disqualified to enter said tract of land because of the fact, first, that said land was a part of the public domain ceded to the United States by the Muscogee or Creek nation, which session was ratified by act of Congress approved March 1, 1889, and opened to settlement by proclamation of the President of March 3, 1889, and, second, because said Thomas W. Potter had, after the 1st day of March, 1889, and prior to noon of April 22, 1889, entered upon said land

so opened to settlement." It is further alleged that the Register and Receiver "found the fact to be that the said plaintiff (Thomas W. Potter) had entered said land between said dates and was, therefore, under the statutes, disqualified to make settlement or homestead entry thereon." It is alleged that this finding, upon successive appeals in the Department, was affirmed, but that upon motion for review the Acting Secretary held that such facts did not disqualify the plaintiff, and revoked the decision of the Hon. Secretary of the Interior, when on the facts found and stated in the opinion, under the law, the decision of the Secretary of the Interior should have been affirmed and the land awarded to Gilman C. Hall (then the entryman, the appellee being his widow.) (See printed record, pages 5 and 6.) The cross-petition clearly shows that the land would have been awarded to the appellee, but for the erroneous decision that the undisputed fact of Potter's entry upon the land during the prohibited period did not disqualify him to homestead the same. The Act of Congress is referred to, and the fact showing Potter's violation thereof (as found by the Department) are clearly stated, and it is alleged that the final decision upon these facts was erroneous. This would seem to be sufficient.

WAS THE CROSS-PETITION INSUFFICIENT BECAUSE OF FAILURE TO OFFER TO RESTORE TO THE PLAINTIFF THREE DOLLARS FIFTY-SIX CENTS LAND OFFICE FEES, SHOWN BY HIS PETITION TO HAVE BEEN PAID BY HIM IN ACQUIRING TITLE FROM THE GOVERNMENT?

Potter filed petition in ejectment, against appellee to recover possession of the land in question, on which she has resided since her husband, now deceased, initiated his right thereto under the homestead laws. To his petition he attached a land office receipt showing the payment of three dollars fifty-six cents land office fees of some kind, and alleged that he acquired title from the United States under section 2291 of the Revised Statutes. This receipt was attached merely as evidence of his title, and constituted no part of the statement of his cause of action. But he now contends that the cross-petition should have contained an offer to refund the amount shown by the receipt. (For copy of receipt see printed record page 4.) He rests his contention upon the maxim that he who seeks equity must do equity. What is this "equity" which a party appealing to a court of chancery must do before he is entitled to relief? If it be not such as Potter might have enforced by some proceeding, either at law or in equity,

in case Mrs. Hall had not filed her cross-petition, then it does not come within the rule that he who seeks equity must do equity. Otis vs. Gregory, 111 Ind., 504-510, 13 N. E. 36; Beach, Mod. Eq. Pr., vol. 1, 13-14; Finch vs. Finch, 10 Ohio St., star page 501-508. Clearly the rule does not apply, Potter had no cause of action again Mrs. Hall for the three dollars and fifty-six cents.

The cross-petition shows, among other things, long continued and expensive litigation between these two parties, before the Land Department, in attempt to acquire title to this land. When the circumstances show that an offer would have been rejected, no offer need have been made. 3 Ency. P. & P., 368; Caldwell vs. Dulin, 22 Ga. 15. The circumstances shown in this case indicate that such offer would have been rejected.

It is said that even under the chancery practice the offer to do equity is but a matter of form, and not of substance; and that a demurrer will not lie for failure to make the offer, unless the rules of the court require it. 6 Ency. P & P., 480; Beach, Mod. Eq. Pr., Vol. 1, 272. The absence of the offer to do equity is not fatal, and the object and purpose of the rule is satisfied by framing the decree so as to impose equitable

conditions upon the relief granted. Thomas vs. Beals, 154 Mass., 51; Shuee vs. Shuee, 100 Ind., 177; Cline vs Vogel, 90 Mo., 239-244; Alexander vs. Merrick, (Ill.), 13 N. E. 190; Farwell vs. Harding, 96 Ill., 32; Loney vs. Courtney, et al, (Neb.) 39 N. W. 616; Sanford vs. Flint, 24 Mich.. 26. The maxim aims at justice, but there is such a thing as invoking its aid in support of equity so trivial and trifling as to make it work injustice. Hence that other maxim, *"de minimis non curat lex."* It was always a ground of demurrer under the equity practice that the value of the subject matter was beneath the dignity of the court. Beach, Mod. Eq- Pr. vol. 1. p. 271. The old limitation from analogy to the English Chancery rule of ten pounds sterling was fifty dollars but never so trifling as three dollars fifty-six cents. Carr vs. Inglehart, 3 Ohio St., 457; Beach, Mod. Eq. Pr., vol. 1, p. 20.

WAS POTTER DISQUALIFIED UNDER THE LAW TO MAKE ENTRY OF THE LAND, BY REASON OF THE FACTS FOUND BY THE LAND DEPARTMENT?

"As the question of Potter's qualifications it is shown that sometime prior to the opening of Oklahoma to settlement, he had been in the employ of the Indian

Agent in charge of the Cheyenne and Arapahoe Agency, which reservation adjoins the Oklahoma land on the west. On the morning of April 22, 1889, he was directed by the Indian Agent to take charge of fifteen Indian police and proceed to the east line of the Cheyenne and Arapahoe reservation and preserve order and prevent any settlement on the same."

"The authority of Potter obtained from the Indian Agent was only coextensive with the Cheyenne and Arapahoe reservation, and did not extend to the Oklahoma land. When he crossed the line onto this tract before the legal hour, he became a trespasser the same as any other person not clothed with authority."

"The fact that he exhibited anxiety to keep this tract clear and exceeded his authority so far as to leave the reservation and order people off this tract, would raise a very strong inference that he had this particular tract in view and intended to settle upon it."

Such are the findings of the Honorable Register who tried the case in the local land office. (See printed record, pages 7 and 8.) Potter's contest was thereupon dismissed, and Hall's entry held intact. On appeal, before the Honorable Secretary of the Interior, whose decision is attached to the answer and cross-petition. (see printed record, pages 9 and 10,) he concluded the same as follows:

"By going into this territory on the morning of April 22, 1889, before the hour when the lands therein

were opened to settlement, he necessarily secured an opportunity to observe the various tracts lying near the line, and the way of reaching them, and this taken in connection with the fact that at the said hour he went directly from the line to the tract in question, makes it plain in my mind that if he did not previously select the said tract in dispute, he obtained information that gave him an advantage over rival claim seekers. It follows under the prevailing rulings that Potter is not qualified to make entry of land in Oklahoma, and that his application must be rejected. The entry of Hall will, accordingly, remain intact."

On motion for review of this decision by the Honorable Secretary, the Acting Secretary aforesaid disposed of the case finally as follows:

"The decision on review sets out a statement of the facts on which its conclusions are based as follows:

"The tract in qnestion formed a part of the lands in Oklahoma which were opened to settlement at noon on April 22nd, 1889. Shortly before this date Potter had been appointed by the Indian agent at the Cheyenne and Arapahoe agency as assistant chief of police, with instructions to proceed to the east line of the reservation to preserve order and prevent any settlement on the same. The said east line of the Cheyenne and Arapahoe reservations is also the west line of the lands opened to settlement, as aforesaid, and is within, possibly a quarter of a mile from the tract in question.

"On the morning of April 22nd, 1889, some three or four hours before the hour of noon, Potter, who it

seems, was at said line, seeing some freighters camping on the tract involved, went thereon and ordered them off, he then returned to the line and at the hour of noon started in the race for the claim. He reached the land before any of his competitors and as he states, commenced his settlement at one-half or one minute after twelve o'clock.

"Accepting this statement as correct and a re-examination of the record satisfies me of its correctness so far as it goes, I scarcely think the conclusion warranted that he necessarily secured an opportunity to observe the various tracts of land lying near the line and the way of reaching them, so that he obtained information that gave him an advantage over rival claim-seekers. He had been employed at the Cheyenne and Arapahoe agency near by since 1883, and for six years before the opening of the country for settlement, he had lived in close proximity to the land in dispute. He had nothing to gain or to learn, therefore, by the short excursion with which he is charged and which it cannot be denied was made in the performance of duty devolved upon him by the orders of the agent who appointed him to the command of the police at that point. He neither gained nor sought advantage and it was error to hold that under the circumstances of his entry into the Territory, he was disqualified thereby." (See printed record, page 10 to 12.)

The acting secretary clearly separates the facts of the case from mere conclusions. He accepted the state-

ment of facts found and set forth in the decision before him for review, and is satisfied with its correctness. He is satisfied with the finding that "Potter was appointed by the Indian Agent at the Cheyenne and Arapahoe agency as assistant chief of police, with instructions to proceed to the east line of the reservation to preserve order and prevent any settlement on the same."

His conclusion, therefore, that Potter's excursion was made in the performance of duty devolved upon him by the order of the agent who appointed him to the command of the police at that point, in a misstatement of the fact already found, and stated by him to the contrary.

The finding that Potter's instructions required him to preserve order on the reservation and prevent settlement thereon, does not warrant the conclusion that Potter was in the discharge of his duty in going into the forbidden territory to prevent settlement there.

We pass this unwarrantable conclusion with the remark that the facts being found the court will draw its own conclusion.

And the facts were found that Potter did not enter the

forbidden land under any authority, or in the performance of any duty; that he was a trespasser; that he did obtain information that was of advantage to him. As a matter of law, and not of fact, it is clear he could not, as assistant chief of the agency police, have any authority or any duty to perform in the forbidden lands. The records show that Potter was an employee of the Indian department, and it must be assumed that he well knew he had no authority to enter upon the Oklahoma land. We have no doubt his purpose was to scan every foot of the line over which he would make the race from the reservation line to the nearest line of the land in question. The race was to be one of speed; it was to be short and sharp; it was not a question of endurance as to horses; it was a matter of solid footing and utmost speed; such a race as where an advantage of a rod in the start would win the race, where a stumble, the swerving of the horse from the line he was pursuing, a slacking of his utmost speed, would lose it. To see every rod of the course over which he would run, to note every hole, every ditch, every pit-fall, to fix with his eye the exact spot where the course would intersect the line of the land in question, and to be so informed as to be able to rush his horse at its utmost speed, with

confidence that there was nothing ahead to fear, and to know exactly when the line had been reached, was information to be appreciated and was longed for by all the men who took part in that break-neck race.

The Honorable Register who tried the case in the local land office, and the Honorable Secretary of the Interior, evidently know what it means to run a spirited horse under the whip over the virgin sod. Advantage? It was the very essence of advantage. To know the course to run, to acquire that information, was the great temptation which made "sooners." The issue must be determined upon the fact that Potter voluntarily and intentionally entered upon the Oklahoma lands during the prohibited period. He admitted it and it was so found by the department. His act brings him squarely within the letter and spirit of the penalty provided.

"Any person who may enter upon any part of said lands in said agreement mentioned, prior to the time that the same are opened to settlement by act of Congress, shall not be permitted to occupy or make entry of such lands or any part thereof."

Sec. 2, Act March 1, 1889, 25 Stat. at Large, Chap. 317, p. 575.

"Until such lands are opened to settlement by proclamation of the President no person shall be per-

mitted to enter upon and occupy the same, and no person violating this provision shall ever be permitted to enter any of said lands or acquire any right thereto."

Act of March 2, 1889, 25 Stat. at Large, 1005, Chapt. 412.

It is this law which the land department, which the Hon. John M. Reynolds, representing the same, misapplied to the undisputed fact, and of which the President said in his warning proclamation, "The officers of the United States will be required to strictly enforce the provisions of the act of Congress to the above effect." 26 Stat. at Large, 546.

May these provisions be whittled away and the act emasculated? In Smith vs. Townsend, 148 U. S., 490, (L. C. P. Edition, Book 37, p. 533), the court applies the canons of construction, the surrounding circumstances, the history of the times, the defect and mischief which the statute was intended to remedy and say:

"Under such circumstances as these, this legislation was passed, and what in view thereof was the intent of Congress? As disclosed upon the face of this legislation evidently its purpose was to secure equality between all who desired to establish settlements in that country. The language is general and comprehensive: 'Any person who may enter upon any part of said land

* * prior to the time that the same shall be opened to settlement * * shall not be permitted to occupy or make entry of such lands or lay any claim thereto.' No exception is made from the general language of these provisions; and it was evidently the expectation of Congress that they would be enforced in the spirit of equality suggested by the generality of the language."

That is to say, as there is no exception in the language of the statute, there can be none in its enforcement. In that case it was sought to make the point that the statute was penal and must be strictly construed, and if so construed it could not be held that Smith, who resided on the railroad right-of-way during the prohibited period, had entered the lands of Oklahoma, and the court made answer:

"That portion which describes the qualification for entry must be liberally construed, in order that no one be permitted to avail himself of the bounty of Congress, unless evidently of the classes Congress intended should enjoy that bounty. The general language used in these sections indicates that it was the intent to make the disqualifications universally absolute. It does not say 'any person who may wrongfully enter,' etc., but 'any person who may enter,'—rightfully or wrongfully, is implied."

Thus, as we understand it, the qualification is ab-

solute and cannot be frittered away on the theory of "no advantage gained."

The next case decided by the Supreme Court is that of Payne vs. Robinson, 169 U. S. 323 (L. C. P. Edition, Book 42. p. 764), and cites the case of Smith vs. Townsend, supra, with approval.

The case of Calhoun vs. Violet, 173, U. S., 60-95 (L. C. P. Ed., Book 43, p. 614), is squarely in point. This case was appealed from the Oklahoma Supreme Court and affirmed, and we take the facts from the decision in that case (4 Okla. Rep., 321) as follows:

"The testimony of Calvin A. Calhoun himself, as quoted by Messrs. Perkins and Chandler, his attorneys, on pages 17 and 18 of their brief, shows that he arrived at Oklahoma station from Arkansas City on Saturday, April 20, 1889, after dark, and remained there that night, and left for Arkansas City Sunday morning at 8:30 o'clock; that on his arrival at Oklahoma station on Monday, April 22, 1889, he went with his son directly to the tent which his son had erected on the land in contest."

In the decision by the United States Supreme court it is said:

"The fact that the plaintiff had entered the territory prior to the time fixed by the statute and the proclamation of the President, having been conclusively determined, it follows inevitably, as a legal result, that

an entry of land under such circumstances was void, and the ruling of the land department so holding was correct."

This Court in same case said:

"We conclude, therefore, first, that Calhoun disqualified himself from entering or acquiring title to the land in dispute, by reason of having entered upon a portion of the lands thrown open to settlement by the Act of March 2, 1889, after the passage of that act and prior to noon, April 22nd."

The statute makes the fact of non-entry during the prohibited period an additional personal qualification. And like the other qualifications of an entryman, it is absolute and cannot be waived on any ground, and Potter's lack thereof cannot be supplied by showing that he gained no advantage by divesting himself of such qualification. By so doing he clearly disqualified himself, and, in the language of the court, (Smith vs. Townsend), that portion of the statute "which prescribes the qualifications for entry is to be liberally construed in order that no one be permitted to avail himself of the bounty of Congress unless evidently of the classes Congress intended to enjoy that bounty.

The doctrine of "no advantage gained," contended for in this case by appellant, has no place within the meaning of the statute. Patterson v. Willson, et al, (Oklahoma) 65 P. 921.

In each of the above cited cases of Calhoun v. Violet and Patterson v. Willson, it is shown that appellant, who had entered the Territory during the prohibited period, was out at the appointed time for the opening, and came in thereafter. As we understand the facts they are cases in point.

The judgment entered in the court below should be affirmed. Respectfully submitted,

CHARLES P. LINCOLN,
MARK D. LIBBY,
Solicitors for Appellee.

Supreme Court of the United States.

No. 168.—October Term, 1902.

Thomas W. Potter, Appellant, vs. Mary Hall. } Appeal from the Supreme Court of the Territory of Oklahoma.

[April 6, 1903.]

This case involves conflicting claims to a tract of land in Oklahoma. Potter, the appellant, who was plaintiff below, claiming to be the owner by title derived under the homestead laws of the United States, sued to recover the property. Mrs. Hall, the appellee, the defendant below, by answer and cross petition averred that herself and husband, being duly qualified to enter the land under the homestead laws, were the first to enter upon and occupy it in the year 1889, when it was opened for settlement, and that they had resided on it as their homestead up to the time of the death of the husband, and she thereafter had continued to reside on it as a homestead up to the bringing of the suit. It was alleged that Potter, claiming that he had duly entered upon the land, contested the right of Hall to make entry thereof, on the ground that Hall did not possess the requisite qualifications and had abandoned the land, and that Hall, on the other hand, had contested the right of Potter on the ground that he had unlawfully entered upon the land prior to the time when it was open for settlement in violation of the act of 1889 and the proclamation of the President carrying out the provisions of that act. It was, moreover, alleged that the result of these contests was a recommendation by the local land officers that Hall's application be approved and that Potter's be rejected. A copy of the report of the register and receiver was made a part of the cross petition. It was then averred that the Secretary of the Interior, in reviewing the action of the Commissioner of the General Land Office, passing on the recommendation of the register and receiver, had approved the finding of the local officers, but that subsequently the Acting Secretary had reviewed the previous decision of the Secretary, had rejected the claim of Hall and sustained the right of Potter, and that the patent of the United States had issued to Potter in consequence of such decision. The opinion of the Secretary on the first hearing and that on the second were also made part of the cross petition. Charging that the decision of the Secretary in favor of Potter involved error of law reviewable by the court, the prayer of the cross petitioner was that, as the widow of Hall, she be recognized as entitled to make entry of the land; that Potter be adjudged to hold the land under the patent of the United States

for her benefit, and that a decree be awarded directing a conveyance. To the cross petition Potter demurred on the ground of no cause of action. The demurrer having been overruled, and Potter declining to plead further, a decree was entered in favor of the defendant Hall, adjudging the land to her and decreeing a conveyance. The Supreme Court of the Territory affirmed the decree. The material facts found by the Land Department are these: Potter entered on the land the 22d of April, 1889, the day upon which it was open for settlement, and continuously maintained his residence thereon. Hall first entered upon a part of the land about six months after, that is, in October, 1889. The facts concerning Potter's entry were stated by the Secretary in his opinion on the first hearing as follows:

"The history of the case and the material facts are set out in the decision appealed from and need not be restated in detail. The tract in question formed a part of the lands in Oklahoma which were opened to settlement at noon on April 22, 1889; shortly before this date Potter had been appointed by the Indian agent of the Cheyenne and Arapahoe agency as assistant chief of police, with instructions to proceed to the east line of the reservation, preserve order and prevent any settlement on the same. The east line of the Cheyenne and Arapahoe reservation is also the west line of the lands opened for settlement as aforesaid, and is within possibly a quarter of a mile from the tract in question. On this morning of April 22, 1889, some three or four hours before the hour of noon, Potter, who it seems was at said line, seeing some freighters camped on the land involved, went thereon to order them off; he then returned to the line, and (at) the hour of noon started in the race for a claim; he reached the land before any of his competitors, and, as he states, commenced his settlement at one-half or one minute after twelve o'clock."

The deduction which the Secretary drew from these facts was thus stated by him:

"In my opinion the facts just stated sustain the conclusion reached by the local officers to the effect that Potter was not qualified to enter the tract in question by going into the territory on the morning of April 22, 1889, before the hour when the lands therein were opened to settlement; he necessarily secured an opportunity to observe the various tracts lying near the line and the ways of reaching them, and this taken in connection with the fact that at the said hour he went directly from the line to the land in question makes it plain in my mind that if he did not previously select the tract of land in dispute, he obtained information that gave him an advantage over rival claim seekers. It follows under the prevailing rulings, (*Dean* v. *Simmons*, 17 L. D. 526,) and cases cited, that Potter is not qualified to make entry of land in Oklahoma, and that his application to enter the tract in question must be rejected."

The Acting Secretary, when he came to consider the case on a rehearing or review, whilst accepting the facts concerning Potter's entry as stated in the previous opinion, drew from them a different conclusion from that which had previously been deduced. He said:

"Accepting this statement as correct, and a re-examination of the record satisfies me of its correctness so far as it goes, I scarcely think the conclusion warranted that he necessarily secured an opportunity to observe the various tracts of land lying near the land and the way of reaching them, so that he obtained information that gave him an advantage over rival claim seekers. He had been employed at the Cheyenne and Arapahoe agency near by since 1883, and for six years before the opening of the country to settlement he had lived in close proximity to the land in dispute. He had nothing to gain or to learn. Therefore, by the short excursion with which he is charged, and which it cannot be denied, was made in the performance of duty devolved upon him by the orders of the agent who appointed him to the command of the police at that point. He neither gained nor sought advantage, and it was error to hold that under the circumstances of entry into the territory he was disqualified thereby."

Mr. Justice WHITE, after making the foregoing statement, delivered the opinion of the Court.

The Supreme Court of the Territory disregarded the final action of the Land Department as expressed in the opinion of the Acting Secretary on the rehearing, and decreed that Potter held the land in trust for the defendant and appellee on two grounds: First, because the final action of the department was held to be a violation of the provisions of the law opening the land in question to settlement; and, second, because, as stated by the court, "We feel less hesitation in reversing the conclusion of the last tribunal of the Land Department 'on review,' not only because the conclusion we now arrive at is that *which must necessarily be arrived at upon the facts*, (italics ours,) but also because it was the one accepted by the Secretary of the Interior, as well as the Commissioner of the General Land Office." The conclusion of the court, that the final action of the Land Department was contrary to law, was rested upon what was deemed to be the controlling effect of the rulings in *Smith* v. *Townsend*, (148 U. S. 490;) *Payne* v. *Robinson*, (169 U. S. 323,) and *Calhoun* v. *Violet*, (173 U. S. 60.) But the decisions relied upon do not sustain the conclusion which the court deduced from them. In all three of the cases the only question decided was the validity of an entry made by one who was within the inhibited territory at the time when the land was opened by law for settlement. The cases therefore did not involve whether one who was outside of the territory at the moment of time when the land was opened, lost his right to take part in the race into the territory because at a time previous to that moment he had been within the territory in question. Indeed, not only was the question which this case presents not embraced within the decisions upon which the court below based its conclusion, but it was expressly excluded from the rulings made in the cases in question. Thus, in *Smith* v. *Townsend*, in referring to the statute and the President's proclamation opening the land for settlement, it was said in the concluding passage of the opinion (p. 501):

"It may be said that if this literal and comprehensive meaning is given to these words it would follow that any one who after March 2 and before April 22 should chance to step within the limits of the territory would be forever disqualified from taking a homestead therein. Doubtless he would be within the letter of the statute; but if at the hour of noon on April 22, when the legal barrier was by the President destroyed, he was in fact outside of the limits of the territory, it may perhaps be said that if within the letter he was not within the spirit of the law, and, therefore, not disqualified from taking a homestead. Be that as it may—and it will be time enough to consider that question when it is presented—it is enough now to hold that one who was within the territorial limits at the hour of noon April 22 was, within both the letter and the spirit of the statute, disqualified to take a homestead therein."

The court below having then erroneously held that the case was controlled by the previous adjudications of this court, we are called upon to determine the question which was expressly reserved in *Smith* v. *Townsend*, that is, whether one who was outside of the legal barrier at twelve o'clock M. on April 22, the day and time when that barrier was removed by operation of law and the terms of the proclamation of the President, was disqualified from participating in the race for the land because prior to that date and within the prohibited period he had been within the territory which was thereafter to be opened for settlement. The statutes and proclamation of the President by which this question is controlled were fully set out in *Smith* v. *Townsend*, *supra*, and need not be at length restated. Suffice it to say, that the provisions opening the land for settlement, regulating the mode of settlement and the President's proclamation executing these statutes, are found in the act of March 1, 1889, (25 Stat. 757,) the act of March 2, 1889, (25 Stat. 980 and 1005,) and the proclamation of the President of March 22, 1889, (25 Stat. 1546.) The first of these acts contained the provision that "any person who may enter upon any part of said lands in said agreement mentioned prior to the time that the same are open to settlement by act of Congress shall not be permitted to occupy or to make entry of such lands or lay any claim thereto." The act of the subsequent day (March 2, 1889) contained the following provision:

"But until said lands are opened for settlement by proclamation of the President, no person shall be permitted to enter upon and occupy the same, and no person violating this provision shall ever be permitted to enter any of said lands or acquire any rights thereto."

The proclamation of the President contained these words:

"Warning is hereby again expressly given, that no person entering upon and occupying said lands before said hour of twelve o'clock, noon, of the 22d day of April, A. D. 1889, hereinbefore fixed, will ever be permitted to enter any of said lands or acquire any rights thereto."

Doubtless, as observed in *Smith* v. *Townsend*, a rigorous adherence to the mere letter of these statutes and the terms of the proclamation would exclude every person from the right to enter and occupy land within the

prohibited territory, even although such person was outside of the territory, and therefore on an equality with all others if perchance such persons had accidentally or otherwise gone into the prohibited territory between the second day of March and the twenty-second day of April. But it is also true that if the provisions of the statute and proclamation be enforced, not according to their mere letter, but in harmony with the intention which may be fairly deduced from them, a contrary rule would result. Whilst, as held in *Smith* v. *Townsend* and the cases referred to which have followed it, obviously the purpose of the statute was to exclude any one from entering land who was within the territory at the period fixed for the opening, it may well be doubted whether the words "enter upon and occupy," as used in the act of 1889 and in the President's proclamation, embrace the mere accidental or casual presence in the prohibited territory subsequent to the 2d of March and prior to the 22d of April of one who was outside on the 22d of April, and therefore in a position of substantial equality with others seeking to make the race for the land.

The Land Department, charged with the execution of the act, was early called upon to determine whether one who was outside of the territory at the time of the opening, and took part in the race for land was disqualified because, subsequent to the second of March, and before the opening, he had been within the limits. In the case referred to the entryman had, on the 20th of April, crossed the line accidentally and gone two miles into the territory, but on being informed of the fact, had retired and waited with others on the line until the 22d, the day of opening. After considering the terms of the statute the conclusion was reached that an entry of this kind was not within the spirit of the prohibition of the statute, and the entry was confirmed. *Donnell* v. *Kittrell*, (1892) 15 L. D. 580. This ruling was followed in *Higgins* v. *Adams*, (18 L. D. 508,) where it was held that one who had gone into the disputed territory on the morning of the day of the opening for the purpose of watering his team, and who, on completing this object, had returned to the boundary and made a start with the others, did not come within the spirit of the statute. In *Curnutt* v. *Jones*, 21 L. D. 40, (1895) the whole subject was elaborately reviewed and many prior cases referred to. Briefly the facts in the case were these: The entryman had resided for several years in the vicinage of the prohibited territory, and had habitually entered therein for the purpose of getting his mail. On the day, however, of the opening he was at the line with others and took part in the race for land. It was held that the prior entry did not deprive him of the right to enter land; that whether entry prior to the day of the opening affected the right to make entry would depend upon the facts of each particular case, and upon whether, in considering them, it was concluded that the prior entry placed the one who had made it in such a position of advantage over

others as to render it unjust and inequitable to allow him to make an entry of land. In summing up the case Mr. Secretary Smith, in his opinion, said:

"Jones, the defendant in this case, had lived for some time on the border of the territory within less than a mile from the line, and almost from the necessity of his situation was familiar with the lands in the immediate vicinity. His information respecting them, and particularly respecting the tract subsequently entered by him, is shown to have been acquired long prior to March 2, 1889, and as was well said in the case of *Golden* v. *Cole's Heirs*, (*supra*,) 'it was impossible to deprive people who had been over the territory of a knowledge that they had thus acquired.' His periodical visits to Oklahoma City, which was at once his post office, his most convenient and accessible railway station, and his market town, do not appear to have brought him any advantage over other persons seeking lands in the territory."

In *Tipton* v. *Maloney*, 23 L. D. 186, (1896) it was held that one who within the prohibited period had passed along the highways in the territory was not disqualified for making an entry, provided he was outside of the line on the day of the opening and took part on an equality with others in the effort to secure land. And rulings to the like effect were made in *Hensly* v. *Warner*, (24 L. D. 92,) and *Henderson* v. *Smith*, (28 L. D. 303.) The settled rule then applied by the Land Department in the execution of the statute is that one who took part in the race for land on the day of the opening was not prohibited from taking land because of a prior entry into the territory unless it be shown that manifest advantage resulted to the entryman from his previous going into the territory. The rule thus for a long period and consistently enforced must obviously have become the foundation of many rights of property. And as we consider that the rule thus applied in the practical administration of the statute by the officials by law charged with its execution conforms to its intention, we are unwilling to overthrow it by a resort to a narrow and technical construction. It remains only to consider whether error was committed by the department in finally ruling that the entry made by Potter on the morning of the 22d, before he returned to the line to take part in the race, involved error of law reviewable by the courts. But as such entry did not, as a matter of law, preclude Potter's right to go outside of the territory and take part in the race for land, but depended upon whether, as a matter of fact, he obtained by his previous going into the territory a substantial advantage over others, which he would not have otherwise possessed, it follows that the final conclusion of the department that no such advantage resulted, involved but the finding of an ultimate fact and not a conclusion of law, and it is, therefore, not reviewable. If the facts found by the Secretary had no tendency to sustain the conclusion reached by him it might be that a question of law would arise, but

such is not the case. Indeed, in view of the finding that Potter had been for a long period of time living across the line in close proximity to the land which he entered, and which was only a quarter of a mile distant from the place where the race began, and that he reached the land in two minutes from the time when the start was made, it might well be argued that his going into the territory, as stated, had no tendency to establish that he obtained an advantage by reason of acquiring information which he had not previously possessed. But so to say would lead only to the conclusion that as a matter of law the department rightly held that Potter was a qualified entryman. The fact that the final conclusion as to the ultimate facts reached by the department differed from the conception of such ultimate facts entertained by the department in previous stages of the controversy, affords no ground for disregarding the conclusion of ultimate fact finally reached, which was binding between the parties.

The judgment of the Supreme Court of the Territory must be reversed, and the cause remanded for further proceedings in accordance with this opinion.

And it is so ordered.

True copy.

Test:

Clerk Supreme Court, U. S.